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AN INVESTIGATION OF THE NATIVE RIGHTS OF BRITISH SUBJECTS.

Major hæreditas venit unicuique noſtrum a jure et legibus, quam a parentibus.

CIC.

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HC911. 1784. P59

To the READER.

JEALOUS and tenacious as this nation ever has been of it's rights and liberties, it is truly aſtoniſhing, that ſo many individuals ſhould be ignorant of the manner, in which their title accrues to the enjoyment of them. The general knowledge of theſe rights and liberties, is familiar to every deſcription of perſons throughout the kingdom: nor ſhall the moſt inſignificant ſubject be impeded, moleſted, or crampt in the

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enjoyment of any one of them, but the nation will often take up as a common cauſe, the attempt to invade the rights and liberties of an Engliſhman. We have ſeen the greateſt ferments raiſed in the nation, by the illegal or injudicious exertion of power over the ſubject on one ſide, and the inconſiderate or unwarrantable reſentment of a free people on the other. The ſpirit of freedom, which pervades moſt parts of the kingdom in the preſent age, falls very ſhort of licentiouſneſs: yet however the principles of true liberty, are ſo univerſally received, that the nation will undoubtedly ſacrifice every other conſideration, rather

ther than countenance a doctrine deſtructive of liberty. The natural and civil rights of mankind have been within this century, more thoroughly inveſtigated, than they had been in former ages; though the means of aſſerting them, in ſome inſtances, may have been more violent, than the nature of the claim would juſtify. Such inſtances ſhould rather encourage, than check the legal inveſtigation into thoſe laws, which give the rights.

No point of our law more intimately affects individuals, than that, which gives and aſcertains the rights of a natural born ſubject: no point, which hath been been leſs attended to: few

points

points more clearly decided in fact; and few which have retained the appearance of more obſcurity.

It is no leſs certain than unaccountable, that much obſcurity has for many years continued to eclipſe the light of the caſe. The author does not preſume to determine whether the darkneſs, in which the doctrine attempted to be ſupported in the following ſheets, ſeems to have been immerſed, aroſe from party prejudices, or from the want of an impartial inveſtigation. Be it now his province to inveſtigate the law with impartiality, and to diſcloſe it without ambiguity.

in

In the purſuit of this attempt, he was penetrated, as he hopes his readers will alſo be, with Lord Coke's axiom, that

Neminem oportet eſſe ſapientiorem legibus.

E R R A T A.

Page 3, line 3, omit the words *and laſt.*

Do. 70, — 11, omit *their.*

Do. 115, — 10, inſtead of *father* read *other.*

AN

INVESTIGATION, &c.

IN the *civilized* ſtate of ſociety there muſt neceſſarily exiſt ſome degree of ſubordination, by which the multitude ſhall be ſubjected to a ſuperior power; yet ſo congenial are the laws of civil ſociety with thoſe of pure nature, that no man ſhall be compelled to ſubject himſelf to a ſuperior power, without receiving an adequate compenſation for admitting ſuch a ſuperiority of his fellow creatures over him, which the law of Nature knew not, but which civilized ſociety requires. Within the dominions of each ſeparate nation, there are certain benefits and advantages to be poſſeſſed and enjoyed by the native *indigenæ*, from which aliens, born out of ſuch dominions, are excluded. The title and admiſſion to theſe benefits and advantages in this country, are the native rights of which the author means to treat.

At the inſtant of birth, the right of being a natural born ſubject accrues to the infant, and he becomes intitled to the benefit and protection of our king, laws, and conſtitution, if the place of his birth was then within the dominions of the king of Great-Britain. Thus is every Britiſh ſubject born a a *debtor*, by the faith, fidelity, fealty, loyalty, ligeance or allegiance which he owes his ſovereign and the ſtate; and a *creditor*, by the benefit and protection of the king, laws, and conſtitution. Now although theſe original and native qualities of *debtor* and *creditor* are ſimultaneous and correlative in their commencement, yet are they not neceſſarily ſo in their duration: the former is on the part of the ſubject, indefeaſible and indelible: the latter is conditional and defeaſible. In a word, the ſubject may do acts, by which he ſhall forfeit his *credit* or right to protection, but cannot of himſelf by any means defeat the *debt* of ligeance, which he owes to the king and ſtate.

My

* My Lord Coke ſays that "Li-"geance is a true and faithful obe-"dience of the ſubject *due* to his ſo-"vereign:" and the intereſt, which the crown hath in this debt of the ſubject is ſuch, that it ſhall not be diminiſhed, ſuſpended, or done away, but by the expreſs words of the ſovereign, or the united concurrence of the legiſlature: it can never therefore be ſaid of any man, that he is out of the ligeance of his lawful ſovereign; for whilſt he has life, he muſt retain that debt, which he contracted at his birth. As a ſubject of the country in which he was born, he is amenable to the laws of his native land, by the infringement or neglect of which, he may incur a forfeiture of his right to the protection of his ſovereign, laws and conſtitution. It is indeed true, that *protectio trahit ſubjectionem, & ſubjectio protectionem;* yet not indefeaſibly ſo on both ſides. Sir Mathew Hale ſays, † "That the na-"tural born ſubject of one prince can-

* Calvin's Caſe 5. † Hale's Pl. C. 68.

" not by ſwearing allegiance to another " prince, put off or diſcharge him from " that natural allegiance; for this na- " tural allegiance was intrinſic and pri- " mitive, and antecedent to the other, " and cannot be diveſted without the " concurrent act of that prince, to " whom it was firſt due." Hence it is that whenever a natural born ſubject, who has entered into the ſervice of a foreign power, is taken in open war, he is indictable for high treaſon, which in all our books is conſtantly ſaid to be *contra ligeantiæ debitum.*

This right and intereſt in the ligeance of the ſubject being then, as we have ſeen, indefeaſibly veſted in the crown for the benefit of the ſtate, it will not be improper to conſider more minutely in what they conſiſt. The power of a ſtate generally depends upon the number, induſtry, and abilities of its ſubjects; and Bracton, talking of them, * ſays, *vita & membra ſunt in poteſtate regis:* and my Lord Coke † properly alledges the reaſon for it;

* Bract. L. 1. Fo. 6. † Co. Lit. 127.

" to

" to the end that they may ſerve the " king and their country when occa- " ſion ſhall be offered." In caſes of ſelf murder, and even of ſelf mayhem, the *civil* guilt of the crime conſiſts merely in the injury thereby done to the ſtate; all which proves uncontrovertibly the inherent and indefeaſible right of the crown to the ligeance of every perſon born within its dominions.

Now although an attainder for high treaſon, for inſtance, ſhall deprive the attainted perſon of his beneficial intereſt in the allegiance, (which with propriety ſhould be termed *protection*), yet is it clear and indiſputable, that the crown, without an expreſs act of parliament, does not in ſuch caſe loſe any part of it's intereſt in the ligeance of the perſon attainted: nor in caſe of his pardon would the crown acquire any new right or dominion over him: his future blood indeed would be no longer corrupted, and he himſelf would be readmitted to the benefit of that protection, which he before had forfeited.

It

It was never ſuppoſed by the ancient writers upon our laws, that any perſon could be out of the ligeance of the king, but as Bracton expreſſed it in the days of Henry the III * *propter defectum nationis*; or as Fleta did in the time of Edward the I † *eò quod eſt ad fidem regis franciæ.* This will appear clear from the words of the indictment in caſes of high treaſon, where if the perſon committing treaſon be a natural born ſubject, the words of the indictment run, *contra regem naturalem Dominum ſuum*, and conclude with *contra ligeantiæ ſuæ debitum:* but if the perſon be not a natural born ſubject, then the words *naturalem Dominum ſuum* are omitted, and the latter words *contra ligeantiæ debitum* are inſerted only to ſhew his *local* allegiance to the ſovereign, againſt whom he had committed the offence.

For it is to be obſerved, that allegiance is either natural and perpetual,

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* Brac. Tract. de Excep. c. 24. fo. 427.

† Fleta, l. 6. c. 47‡.

‡ Calvin's Caſe, ubi ſupra.

or

or local and temporary, according to the birth or reſidence of the parties who owe it. When the legiſlature requires promiſes, oaths, or other external profeſſions of allegiance from ſubjects, it impoſes upon them no new obligation; but it is done merely to add ſolemnity and notoriety to that obligation, which each individual aſſumed at his birth, by ſuperadding the teſt of religion to the force of native allegiance.

Upon the foregoing principles is it, that no letters of denization, or even act of naturalization by parliament, can diſſolve the native allegiance, which the denizen or perſon naturaliſed owed to his former ſovereign: whence he muſt for ever retain a difference from the real native ſubject born in the king's dominions: though ſuch denizens or perſons naturaliſed may claim from us a right of being treated as our ſubjects in conſequence of the mutual obligations introduced by the Letters of Denization, or Act of Naturalization. No man certainly can transfer the right, which

which his native ſovereign hath in him, to a foreign prince, *non poteſt patriam in quâ natus eſt exuere, nec ligeantiæ debitum ejurare*, ſaith my lord Coke; * with which agrees the maxim, *jus originis nemo mutare poteſt.* †

It is a ſettled point, that allegiance is co-extenſive with the dominions of the ſovereign, ‡ and is due to the king in his natural capacity: and ſince the determination of Calvin's caſe, in which the idea of one local allegiance for the natural ſubjects of England, and of another local Allegiance for the natural ſubjects of Scotland was exploded and defeated, every perſon born within the dominions of the king of England, whether in London or Dublin, Scotland or Jerſey, in Hanover or Quebec, is under the protection, conſequently at the ligeance of our King, and thereby capable of taking lands in England by deſcent or purchaſe, and of enjoying all the other Rights

* 1ſt Inſt. 129.

† State trials, vol. 1. Trial of the duke of Hamilton.

‡ Calvin's caſe, ubi ſupra.

and

and liberties of an Engliſhman. Nay even, if a ſubject be abjured the realm,* "Notwithſtanding this abju-"ration, he oweth the King his li-"geance, and he remaineth within the "the King's protection; for the "King may pardon and reſtore him to "his country again." And the further inference evidently is, that the King has ſtill a right to his perſonal ſervices, if he call for them, and therefore ſtill remains he, at the faith and ligeance of the King.

This doctrine has been uniformly admitted through a ſucceſſion of centuries: A more deciſive inſtance cannot be brought to eſtabliſh it, than the caſe of Sir Walter Raleigh. † He was attainted of high treaſon in the year 1603, and after ſentence had paſſed upon him, he was confined to priſon for 12 years: he was then releaſed,

* Calvin's Caſe 9.

† Cro. Jac. 495. State Tryals 1 vol. Rymer's Fædera Tom xvi. p. 798. See alſo Rapin, Wellwood, Wilſon, Smollet, Hume, &c.

and the King having occaſion for his ſervices, appointed him Admiral of a fleet of 12 ſail, by commiſſion under the Great Seal, † " for a voyage to " Guiana; and after his return he " was remanded to the tower: the re- " cord of the attainder being brought " and certified into the King's Bench; " was by Habeas Corpus directed to " the Lieutenant of the Tower, " brought unto the bar, where Yelver- " ton, the King's Attorney, ſhewed " how by the King's favor he had liv- " ed thus long, and had ſince done " acts, for which in juſtice he ought not " to be further ſpared; and the King " had given him command to pray exe- " cution; wherefore he now prayed ex- " ecution of this judgment for the king; " and hereupon Sir W. Raleigh being " demanded what he could ſay, why " the court ſhould not proceed and " grant execution againſt him, anſwer- " ed, that he could not deny but that " he was attainted of treaſon as afore- " ſaid, yet he ſuppoſed having com-

† Croke Jac. 495.

" mitted no other acts since, the King " would not cause execution upon the " former judgment; and he conceived " that in regard the King had granted " him so large a commission for his Ma- " jesty's and the realm's service, and " thereby had given him authority to " execute judicial law and power over " the lives of others, that it was a dis- " pensation unto him for his former of- " fences, and he ought not now to be " called in question for them. But " the court replied unto him, that he " being attainted of treason, there " could not be any discharge thereof, " but by the King's express pardon, " and no treason could be pardoned " but by express words mentioning " it: and the King *might use the ser-* " *vice of any of his subjects in what em-* " *ployment he pleased, and it should not* " *be any dispensation for former offences.*" And thereupon Montague, Chief Justice, commanded that execution should be done according to the first judgment, which was done accordingly; Sir Walter being executed on the 29th

Day of October, 1618. From this judgment of the court of King's Bench, we muſt neceſſarily conclude, that an attainted perſon ſtill remains at the ligeance of the King ; for *he* only is a ſubject of the King, who is at the lige ance of the King : here the court admits Sir W. Raleigh (tho' attainted) to be a ſubject of the King, and therefore that the King had a right to em ploy him in the ſervice of the ſtate : All which could not be, if Sir W. Raleigh did not remain at the ligeance of the King ; for where there is no ligeance, there can be no ſovereignty. This doctrine of the court of King's Bench in the year 1618, is ſo far from being antiquated, that it is ſtrictly conſonant with the principles laid down by a very learned and reſpectable writer, about the middle of the preſent century. * "It is a principle in all ſtates "where a man is neither a ſubject by "birth,&c. to conſider him as not with-

* Conſiderations on the law of forfeiture. p. 76.

in

" in their obedience or even notice.
" *But where he has forfeited his civil*
" *rights by crime, he is regarded as ſtill*
" *ſubject to their power, and in every reſ-*
" *pect within the ſtrict conſideration of the*
" *law.*"

There is preſerved in the library of Lincoln's-inn, an ancient manuſcript, written in the days of Queen Elizabeth, which is intitled, " Certain Errors up-
" on the ſtatute made 25th Edward 3.
" of children born beyond the ſea, con-
" ceived by Serjeant Brown, and confu-
" ted by Serjeant Fairfax, in nature of a
" dialogue," which contains the follow-ing lines, not wholly unapplicable to the ſubject under our preſent conſideration: " The word ligeance is ſome-
" times taken for the Prince's domini-
" on and territory, becauſe the people
" born within the ſame are liege ſub-
" jects; but ligeance in it's moſt proper
" & natural ſignification is the bond of
" faith, and ſwallowing up all and the
" greateſt among creatures (reli-
" gion to the creator excepted) done

" by

" by the law of God and nature from
" the ſubject to the Prince and coun-
" try, and by the Prince to his country,
" and to the univerſal ſtate of the ſame
" republic; therefore the word liege
" is common as well to the King, as ſub-
" ject. Mr. Raſtall, with others, con-
" firmeth theſe ſignifications in defining
" an alien. An alien, ſaith he, is he,
" whoſe father and himſelf is born out
" of the ligeance of the Lord our King;
" here he meaneth the territory of
" England: for he addeth, if an alien
" cometh and dwell within England,
" and marrieth and hath iſſue, as who
" ſhould die within our land, the King's
" territory of England, this iſſue is not
" an alien, but engliſh. Likewiſe
" Huſſey declareth his mind and ſen-
" tence in law upon this ſtatute, which
" ſaith, children whoſe fathers and mo-
" thers at the time of their birth be at
" the faith and ligeance of the Kings of
" England, uſeth theſe words, *Children*
" *born of father and mother engliſh;*
" whereby

" whereby he giveth us to underſtand " that the ſtatute treateth of liege " ſubjects."

Thus far have we conſidered allegiance as founded in the law of civilized nature, which is in order paramount to any particular municipal or written law whatever.* *Jus naturale eſt, quod apud omnes homines eandem habet potentiam.* We will next conſider how the law of England originally ſtood, how it hath in proceſs of time been varied and altered, and how it now ſtands as to the rights of natural born ſubjects. This general law of fealty or allegiance being of civilized nature, is invariable and immutable. † *Jura naturalia ſunt immutabilia.* So tranſcendent then is this firſt law of civilized nature, that it is the very fountain and baſis of all human laws whatever; for ‡ *fruſtra feruntur leges niſi ſubditis & obedientibus.*

* Ariſt. Lib. 5. Æthic.

† Dr. & Stud. 4.

‡ Carter 130.

It would be to prop Olympus with a ſtraw, were I to attempt to add reaſons and authorities to the very clear and deciſive determination of the court upon this point in Calvin's caſe: it ſhould be attended to, that the twelve judges of England, and the lord chancellor, were unanimous in determining this caſe, and that Lord Coke, who reports it, was then lord chief juſtice of the Common Pleas, and one of the judges who gave their opinions upon it. "If "a man be attainted of treaſon or felo- "ny, he hath loſt the King's legal pro- "tection, for he is thereby utterly diſ- "abled to ſue any action real or per- "ſonal, (which is a greater diſability "than an alien in league hath) and yet "ſuch a perſon ſo attainted, hath not "loſt that protection, which by the "law of nature is given to the King, "for that is *indelebilis & immutabilis*; "and therefore the King may protect "and pardon him; and if any man kill "him without warrant, he ſhall be "puniſhed

" puniſhed by the law as a man ſlayer,
" and thereunto accordeth 4 Edw. 4.
" and 35. Hen. 6. 57. 2 Aſs. Pl. 3.
" By the ſtatute of the 25 of Edw. 3.
" c. 22. A man attainted in a *præmu-*
" *nire*, is by expreſs words out of the
" protection of the King generally; and
" yet this extendeth only to legal pro-
" tection, as it appeareth by Lit. f. 43.
" *for the parliament could not take away*
" *that protection which the law of nature*
" *giveth unto him:* and therefore not-
" withſtanding that ſtatute, the King
" may protect and pardon him. And
" though by that ſtatute it was further
" enacted, that it ſhould be done with
" him as with an enemy; by which
" words, any man might have ſlain
" ſuch a perſon (as it is holden in 24
" Hen. 8 Tit. Corone br. 197, until
" the ſtatute made 5 Eliz. c. 1.) yet the
" King might protect and pardon him.
" A man outlawed is out of the benefit
" of the municipal law: for ſo ſaith
" Fitz. Nat. brev. 161. *Utlagatus eſt*
" *quaſi extra legem poſitus:* and Bracton,

" l. 3. tract. 2. c. 11. ſaith that *caput*
" *gerit lupinum : Yet is he not out either*
" *of his natural ligeance*, or of the King's
" natural protection ; for neither of
" them is tied to municipal laws, but
" is due by the law of nature, which
" as it hath been ſaid, was long before
" any judicial or municipal laws."

Notwithſtanding this doctrine is laid down in ſuch very clear and expreſs terms, it ſeems as though it had either been totally diſregarded or groſsly miſconceived, not only by private individuals, but by the legiſlature itſelf.

We have ſeen that every child contracts by its birth within the dominions of Great Britain a debt, which ſhall never be diſcharged or done away, but by a public or private act of the ſovereign or ſtate, to whom it is due. And ſo peculiarly jealous have our ſovereigns been of this native prerogative or right, that in our hiſtory I have not been able to find one inſtance, in which this debt has been releaſed to an individual.

They

They have indeed on frequent occaſions diſpenſed with the payment of it for a time and under conditions, but never conſented to a total extinguiſhment of it, as appears in the licenſes, which have been frequently granted under the ſign manual to individuals, to enter into the ſervice of foreign princes.

The extent, to which this right of the crown to the ligeance of the ſubject, as well as the right of the ſubject to the benefit of protection, (if not forfeited by him) is indefeaſible and immutable, ought particularly to be attended to: for it is not only ſo, whilſt the country, in which he was born, remains under the ſubjection of the prince, to whom it was ſubject at the time of his birth, but for ever after.

No ſubſequent acquiſition of a country by any prince or ſtate, whether by conqueſt, inheritance, exchange or purchaſe, ſhall give this right to thoſe, who were born during the poſſeſſion of the former ſovereign. Thus, for example,

ample, every perſon born within any of the Britiſh colonies in America, before their independence was acknowledged by this country, is and ever will be a natural born ſubject of Great Britain, capable of inheriting lands in this country and claiming all the other rights of an Engliſhman. And for the ſame reaſon, every perſon born in Canada, whilſt it remained under the ſubjection of the French king, cannot claim the rights of a natural born Engliſhman (although now a Britiſh ſubject,) without an expreſs act of naturalization. The judgment of the court upon this point in Calvin's caſe, is thus expreſſed by my lord Coke * " for as " the antenati *(or thoſe born before the* " *union of the two crowns of England and* " *Scotland)* remain aliens as to the " crown of England, becauſe they " were born, when there were ſeveral " kings of the ſeveral kingdoms, and " the uniting of the kingdoms by

* Calvin's caſe, 27.

deſcent

" deſcent ſubſequent, cannot make " him a ſubject to that crown, to " which he was an alien at the time of " his birth: ſo albeit, the kingdom " (which Almighty God of his infinite " goodneſs and mercy divert) ſhould " by deſcent be divided and governed " by ſeveral kings; yet was it reſolv- " ed that all thoſe, that were born " under one natural obedience, whilſt " the realms were united under one " ſovereign, ſhould remain natural " born ſubjects and no aliens: for that " naturalization due and veſted by " birth-right, cannot by any ſepara- " tion of the crown afterwards be ta- " ken away: nor he that was by judg- " ment of law a natural born ſubject " at the time of his birth, become an " alien by ſuch a matter *ex poſt facto*, " and in that caſe, upon ſuch an acci- " dent our *poſt natus* may be *ad fidem* " *utriuſque regis* *.

* Bracton, fo. 427.

It

It is foreign from the purpoſe of this inveſtigation, to enter into the diſcuſſion of this point, whether, *parliament can alter the laws of nature:* therefore the author has not adopted the idea of allegiance, being a law of nature, but only of ſocial or civilized nature: it is not certainly in the power of any one man or any collection of men, to alter the laws of pure nature, which the creator has eſtabliſhed: but as in the civilized ſtate of nature, particular ſocieties muſt eſſentially be liable to variations and changes; therefore does it become eſſentially neceſſary that in the civilized ſtate of ſocieties, there ſhall exiſt in each ſociety a power of altering or modelling the general laws of civilized nature, according to the policy, wants and exigencies of each particular and reſpective ſociety.

In this country, as nothing but an act of parliament can give the right of naturalization, ſo nothing, I apprehend, can

can take it away: Sir Matthew Hale was of this opinion, as we have before ſeen.

I do not now ſpeak of that forfeiture of protection, which a ſubject may incur by his own contempt or infringement of the law. And as there is veſted in the ſupreme legiſlature that tranſcendency of power, which ſhall control the common law of the land, and adapt it to the exigencies and policy of times and occaſions, it ſeems wholly unaccountable, in the multifarious events, revolutions and treaties, whether the conſequence of them has been the aggrandizement or diſmemberment of the empire, that no attention hath ever been paid to the effects of the law as it now ſtands. It cannot be ſaid more clearly, than it hath been expreſſed by my lord Coke, that our new ſubjects of an acquired country remain as aliens incapable of enjoying the benefit of our laws and conſtitution, and cannot be admitted unto the full parti-

participation of them without an expreſs act of naturalization by parliament; thus by becoming ſubjects to the king of England they ſtand in need of the ſame qualification to entitle them to any advantage of our laws, which they did, whilſt they remained under the ſubjection of their former ſovereign. And on the other hand, our late ſubjects of a loſt country continue to partake of the plenitude of all our rights, privileges and liberties, after all benefit and advantage ariſing to the ſtate from their ſervices is totally done away and transferred, perhaps to our enemies. Thus deſtroying the reciprocity of allegiance and ſubjection, we acquire ſubjection without an obligation of granting protection, and are bound to protect thoſe, who are no longer under our ſubjection. If in ſuch caſes then, the legiſlature ſhould in their wiſdom and policy, find the legal conſequences of the want of a claim to be unjuſt, on the one hand, and of the

the right to claim to be unreaſonable on the other; why not upon the acquiſition of a country paſs a general act for naturalizing all the inhabitants thereof,* and upon the loſs or ceſſion of a country, paſs a general act for releaſing the inhabitants thereof from their original and native debt of ligeance, extinguiſhing the right and intereſt of our ſovereign in his former ſubjects, withdrawing the protection which we were formerly bound to give them, and placing them in every future reſpect as aliens. Aſſuredly the natural rights of his Majeſty's ſubjects, are more worthy of the inveſtigation and

* After the union of the crowns of England and Scotland, the parliament of Ireland ſaw the propriety of ſuch an act, and accordingly made a general act for naturalizing all the antenati of Scotland. One of the Ramſay family being an *Antenatus* in Scotland, pleaded the benefit of this ſtatute, to qualify him to inherit in England; but the court held that an Iriſh act of parliament, extending not to England, he remained incapable of taking his inheritance in England; as it is fully reported by lord Vaughan. Shaw v. Ramſay.

attention of the legiſlature, than the breed of cattle or preſervation of game. But I am unvoluntarily digreſſing from the inveſtigation of a point of law, into an interference with the politics of the nation. A natural tranſition will bring me back to my ſubject: and this will be the conſideration of the actual interference of the legiſlature on the ſubject.

The old common law of this country, knew no other than this general law of civilized nature, that *birth alone*, within the dominions of a particular ſovereign, could give the perſon ſo born the right of being a natural born ſubject of that particular ſtate. In the policy of ſucceeding times, it was frequently found expedient to extend the benefit of being a natural ſubject to individuals, who by their foreign birth, were by the common law precluded from it. This was done by letters patent of denization, or by act of parliament for naturalization. My lord Coke

Coke ſtates the difference between them. *Denizen* in the leaſt common ſenſe of the word, importeth a perſon born within the ligeance of the King, *quaſi deins nee* ; but in the more common acceptation of the word,* " is taken for " an alien born, that is infranchiſed or " denizated by letters patents, where- " by the King doth grant unto him, " *quod ille in omnibus tractetur habeatur*, " *teneatur & gubernetur*, *tanquam* " *ligeus noſter infra dictum regnum noſ-* " *trum angliæ oriundus & non aliter neç* " *alio modo.* But the King may make " a particular denization : as he may " grant to an alien, *quod in quibuſdam* " *curiis ſuis angliæ audiatur ut anglus*, " *& quod non repellatur per illam excepti-* " *onem, quod ſit alienigena & natus in par-* " *tibus tranſmarinis*, to enable him to ſue " only. The ſeveral ſenſes of which " word muſt be gathered *ex antecedeñ-* " *tibus adjunctis & conſequentibus*, and

* Co. Lit. 129.

 " they

" they that take him in that ſenſe de-
" rive the word from *donaiſon*, *donatio*,
" becauſe his freedom is given unto
" him by the King. There is another
" kind, and that is an alien naturalized,
" and that muſt be by act of parliament.
" And this alien naturalized to all in-
" tents and purpoſes, is as a natural
" born ſubject, and differeth much
" from denization by letters patents :
" for if the iſſue of an Engliſhman born
" beyond ſeas, be naturalized by an act
" of parliament, he ſhall inherit his
" father's lands ; but if he be made
" denizen by letters patent, he ſhall
" not ; and many other differences there
" be between them."

The firſt act of parliament, which in any manner affected the right of the children of engliſh parents born beyond the ſeas, out of the ligeance of the crown of England, was the 25th of Edward the 3d. ſt. 2. which is conceived in the following words : " Our lord
" the King at his parliament holden at
" Weſtminſter,

" Weſtminſter, at the utas of the
" purification of our lady, in the year
" of his reign the 25th, and of France
" the 12th, conſidering the great miſ-
" chiefs and damages which have hap-
" pened to the people of his realm of
" England, as well becauſe the ſtatutes
" ordained before this time, have not
" been holden and kept as they ought to
" be, as becauſe of the mortal peſtilence
" that late reigned; and willing to
" provide for the quietneſs and common
" profit of his ſaid people, convenient
" remedy; therefore by the aſſent of
" the prelates, earls, barons, and other
" great men, and all the commons of
" his ſaid realm, ſummoned to the
" parliament, hath ordained and eſta-
" bliſhed the things underwritten, viz.
" Becauſe that ſome people be in doubt
" if the children born in the parts be-
" yond the ſea, out of the ligeance of
" of England, ſhould be able to demand
" any inheritance within the ſame
" ligeance or not; whereof a petition

" was

" was put in the parliament late holden
" at Weſtminſter, the 17th year of the
" reign of our ſovereign lord the king
" that now is, and was not at the ſame
" time wholly aſſented: our lord the
" king willing that all doubts and ambi-
" guities ſhould be put away, and the law
" in this caſe declared and put in a cer-
" tainty, hath charged the ſaid prelates,
" earls, barons, and other wiſe men of
" his council, aſſembled in this parlia-
" ment, to deliberate on this point: all
" which of one aſſent have ſaid, that
" the law of the crown of England is,
" and always hath been ſuch, that the
" children of the kings of England, in
" whatſoever parts they be born, in
" England or elſewhere, be able and
" ought to bear the inheritance after
" the death of their anceſtors; which
" law our ſaid lord the king, the pre-
" lates, earls, barons, and other great
" men, and all the commons aſſem-
" bled in this parliament, do ap-
" prove and confirm for ever. And in

" the

" the right of other children born out
" of the ligeance of England in the
" time of our lord the king, they be of
" one mind accorded, that Henry ſon
" of John de Beaumont, Elizabeth
" daughter of Guy de Bryan, and Giles
" ſon of Ralph Dawbeney, and other
" which the king will name, which
" were born beyond the ſea, out of the
" ligeance of England, ſhall be from
" henceforth able to have and enjoy
" their inheritance after the death of
" their anceſtors, in all parts within
" the ligeance of England, as well as
" thoſe who ſhould be born within the
" ſaid ligeance. And that all children
" inheritors, which from henceforth
" ſhall be born without the ligeance of
" the king, whoſe fathers and mothers
" at the time of their birth be and ſhall
" be at the faith and ligeance of the
" king of England, ſhall have and enjoy
" the ſame benefits and advantages, to
" have and bear the inheritance within
" the ſame ligeance as the other inhe-
" ritors aforeſaid in time to come; ſo

always

" always that the mothers of ſuch " children do paſs the ſea by the licence " and wills of their huſbands. And if " it be alledged againſt any ſuch born " beyond the ſea, that he is a baſtard, " in caſe where the biſhop ought to " have cognizance of baſtardy, it ſhall " be commanded to the biſhop of the " place where the demand is, to certify " to the king's court, where the plea " thereof hangeth, as of old times, hath " been uſed in caſe of baſtardy alledged " againſt them, which were born in " England."

The next act, which in any manner concerned this matter, was made in the 5th year of the reign of Richard 2, by which, all manner of people, except only the lords and other great men of the realm, and true and notable merchants, and the king's ſoldiers, were prohibited from going out of the realm without the ſpecial licence of the king, upon pain of forfeiture of all their goods. Whilſt this act ſubſiſted, it in ſome meaſure contracted the effect of king

king Edward's naturalizing act; as will be ſeen hereafter.

This act of Richard was repealed by the 4th of king James the 1ſt, which again gave a general licence to all ſubjects indiſcriminately to go out of the realm, according to the common law of the land. After this repeal of the act of Richard 2d, the ſtatute of king Edward 3d, was of itſelf revived in it's full extent. Thus ſtood the law *de natis ultra mare* for ſeveral centuries; during which ſpace of time, many caſes were determined upon the conſtruction of the ſtatute of Edward 3d: of which notice hereafter will be taken.

No alteration was made in this law, until the 7th year of the reign of queen Ann: * when out of a great zeal to encourage the proteſtant religion, the legiſlature thought proper to naturalize every alien of any deſcription whatſoever, who would take the oaths and ſubſcribe the declaration appointed by the 6th of Ann, and receive the ſacra-

* 7th An. c. 5.

ment of the lord's ſupper according to the rites of the church of England: and otherwiſe enlarged the foregoing act of Edw. 3d. by the following clauſe, "And be it further enacted by "the authority aforeſaid, that the chil- "dren of all natural born ſubjects born "out of the ligeance of her majeſty, her "heirs and ſucceſſors, ſhall be deemed, "adjudged and taken to be natural "born ſubjects of this kingdom, to all "intents, conſtructions and purpoſes "whatſoever."

In the 10th year of queen Ann, an act was paſſed, which recites in the preamble, that divers miſchiefs and inconveniencies had been found by experience, to follow from the laſt mentioned act of the 7th of queen Ann, to the diſcouragement of the natural born ſubjects of this kingdom, and to the detriment of the trade and wealth thereof, and therefore repeals the whole of the 7th of queen Ann, except the clauſe, which relates to the children

of

of her majeſty's natural born ſubjects born out of her majeſty's ligeance.

The next and laſt act of parliament which was made concerning the rights of the children of natural born ſubjects, born out of the king's ligeance, was the 4th of Geo. the 2d. c. 21, which after reciting, that ſome doubts had ariſen upon the conſtruction of the ſaid recited clauſe, in the 7th of Ann, for the explaining of which, and to prevent any diſputes touching the true intent and meaning thereof, enacts, " that all children born out of the ligeance of the crown of England, or of " Great Britain, or which ſhall hereafter be born out of ſuch ligeance, " whoſe fathers were or ſhall be natural born ſubjects of the crown of " England or of Great Britain at the " time of the birth of ſuch children reſpectively, ſhall and may, by virtue of " the ſaid recited clauſe in the ſaid act " of the 7th year of the reign of her " ſaid late majeſty, and of this preſent " act, be adjudged and taken to be,

" and all ſuch children are hereby de-
" clared to be natural born ſubjects of
" the crown of Great Britain to all in-
" tents, conſtructions and purpoſes
" whatſoever.

" Provided always, and be it further
" enacted, and declared, by the authority
" aforeſaid, that nothing in the ſaid
" recited act of the 7th year of her ſaid
" late majeſty's reign, or in this pre-
" ſent act contained, did, doth, or
" ſhall extend, or ought to be conſtrued
" adjudged or taken to extend, to make
" any children born or to be born out
" of the ligeance of the crown of Eng-
" land or of the crown of Great Britain,
" to be natural born ſubjects of the
" crown of England or of Great Bri-
" tain, whoſe fathers at the time of the
" birth of ſuch children reſpectively
" were or ſhall be attainted of high
" treaſon, by judgment, outlawry or
" otherwiſe, either in this kingdom or
" in Ireland, or whoſe fathers at the
" time

" time of the birth of ſuch children
" reſpectively, by any law or laws
" made in this kingdom or in Ireland,
" were or ſhall be liable to the penal-
" ties of high treaſon or felony, in caſe
" of their returning into this kingdom
" or into Ireland, without the licence
" of his majeſty, his heirs or ſucceſ-
" ſors, or any of his majeſty's royal
" predeceſſors, or whole fathers at the
" time of the birth of ſuch children
" reſpectively, were or ſhall be in the
" actual ſervice of any foreign prince
" or ſtate then in enmity with the crown
" of England or of Great Britain; but
" that all ſuch children are, were, and
" ſhall be and remain in the ſame ſtate,
" plight and condition, to all intents,
" conſtructions and purpoſes whatſoe-
" ver, as they would have been in, if
" the ſaid act of the 7th year of her ſaid
" late majeſty's reign, or this preſent
" act, had never been made; any
" thing herein, or in the ſaid act of the

" 7th

" 7th year of her ſaid late majeſty's " reign contained to the contrary in " any wife notwithſtanding."

It would have been unneceſſary to attempt the interpretation of the ſtatute of Edw. the 3d, had not the 4th of George the ſecond expreſsly excluded ſeveral deſcriptions of perſons from claiming under the 7th or 10th of Ann, or the ſaid 4th of Geo. the 2d. If none of theſe three laſt mentioned acts had been made, all perſons born of Engliſh parents out of the ligeance of the king of England, muſt have eſtabliſhed their claim under the 25th of Edw. the 3d: if therefore that clauſe of the 4th of Geo. 2. has any effect at all, it is to drive ſeveral perſons of the preſent generation, and may be more of the future, to claim their right of inheritance by the law, as it ſtood before the 7th of queen Ann had ever paſſed, and as it may ſtand with reſpect to them, until this hour, unaltered and unrepealed from the year 1349.

It

It is rather ſingular, that the 4th of Geo. 2, undertakes to explain the naturalizing clauſe of the 7th of queen Ann, under which the 4th of Geo. the 2d precludes them from claiming, and omits to explain that act of Edw. the 3d. under which it leaves them to claim: yet the former is conceived in terms more ſimple and leſs dubious than the latter: the intent, force, and meaning of words ſpoken only at the diſtance of twenty-three years, muſt be better underſtood and more obvious to every body, than of words ſpoken at the diſtance of 441 years. It is a matter of wonder, that a law, under which many perſons now actually exiſting, and eventually any perſon in future, do or may be driven to claim the right of being a natural born ſubject of this country, ſhould be as little attended to, as though it were obſolete or repealed.

In the conſtruction of a ſtatute, the firſt thing to be conſidered, is the nature

ture of it. This ſtatute of the 25th of Edw. 3d, is partly *declaratory* of the common law, and partly *remedial* and *enlarging*. Of this there can be no queſtion: for as to the firſt part of it, which relates to the birth of the king's children, it expreſsly ſaith, that the law *is and always has been ſuch*, that in whatſoever parts they be born in England or elſewhere, they ſhall be able and ought to bear the inheritance after the death of their anceſtors, and this being only a declaration of the common law, is thereby approved and affirmed for ever. For it was conſonant with the dignity of the crown, that the legitimate iſſue of the blood royal ſhould not be prejudiced by any circumſtance dependant upon the place of their birth.

As to the other part of the ſtatute which relates to the children of ſubjects born abroad, this cannot certainly be declaratory of the old law for theſe reaſons: 1ſt, If it had been declaratory, it would have declared that the

the law had been ſuch before, and would have confirmed it, as it did in reſpect to the children of the king. 2dly, If by the common law of the land, ſuch children born abroad could inherit, there was no neceſſity of their being naturalized, which was the chief end and intention of the legiſlature in paſſing the act. 3dly, It is certain, as will hereafter appear, that by the common law, the place of birth only gives the right of inheriting. The legiſlature then, knowing that by the common law every child born out of the ligeance of the crown of England, was rendered thereby an alien, and of courſe diſabled to inherit lands in England, made a general naturalization act for the benefit of all future generations; thereby enlarging the common law of the land, in favor of the children of Engliſh ſubjects, born out of the ligeance of the king: and *remedying* the evil which was felt by the common law, which excluded thereby the iſſue of many noble and virtuous families

from the ſervice of the ſtate, and impoveriſhed the children of opulent parents, by diſabling them to inherit their anceſtors; and thus is this ſtatute remedial and enlarging. And this is ſtrictly conſonant with the rule laid down by my lord Coke,* where he ſays, "That the moſt natural and "genuine expoſition of a ſtatute, is to "conſtrue one part of the ſtatute by "another part of the ſame ſtatute, for "that beſt expreſſeth the meaning of "the makers." Thus from one part of this ſtatute it appears, that before it paſſed, the king's children, though born out of the ligeance of the crown of England, becauſe they were natural born ſubjects, ſtood not in need of that naturalization, which by the other part of the ſame ſtatute it appears, the children of ſubjects born abroad could not inherit without.

* Co. Lit. 381.

As

As the 25th of Edward 3d, has never been affected by any ſubſequent ſtatute, beſides that of Richard the 2d, (which continued only it's operation for 235 years) and being enlarged by the more general naturalizing clauſe of queen Ann, thoſe perſons who can claim under the more general unconditional words of queen Ann, will never certainly attempt to eſtabliſh their claim under the 25th of Edward 3d; but if the 4th of George 2d, hath the effect of throwing ſeveral perſons out of the benefit or operation of theſe three later ſtatutes, then it becomes a matter of the moſt important conſequence to individuals, to know the true ſenſe, meaning, intent, operation, and effect of the 25th of Edward 3d: for ſuch as it was to our anceſtors who paſſed it in the year 1349, ſuch is it to their poſterity at this day, 434 years after it's paſſing into a law, to all intents, conſtructions, and purpoſes whatſoever.

My lord Coke in his report of Hey-

don's caſe,* tells us, that the court of exchequer unanimouſly reſolved, "that "for the ſure and true interpretration "of all ſtatutes in general, (be they "penal or beneficial, reſtrictive or en- "larging of the common law) four "things are to be diſcerned and conſi- "dered. 1ſt, What was the common "law before the making of the act. "2d, What was the miſchief and de- "fect, for which the common law did "not provide. 3d, What remedy the "parliament hath reſolved and ap- "pointed to cure the diſeaſe of the "common-wealth. And 4th, the true "reaſon and remedy: and then the of- "fice of all the judges is always to make "ſuch conſtruction, as ſhall ſuppreſs the "miſchief and advance the remedy, "and to ſuppreſs ſubtile inventions and "evaſions for continuing the miſchief "*pro privato commodo*, and to add force "and life to the cure and remedy, ac-

* 3 Rep. 7.

"cording

" cording to the true intent of the ma-
" kers of the act *pro bono publico.*"

The 1ſt of theſe points carries it's evidence upon the face of the act itſelf: it is therefore needleſs to recur to other proofs or authorities; the act expreſsly ſays, that by the common law before the making of the act, the children of the kings of England, in whatſoever parts they were born, whether in England or elſewhere, were able to bear the inheritance of their anceſtors: and ſo far is the act merely declaratory as we before obſerved. But as to the children of ſubjects born out of the ligeance of the crown of England, although the act does not ſay in expreſs words, what the common law was *before the making of the act*, yet it as evidently imports it by implication, as the moſt expreſs words could have ſaid it. It appears then by the act, that by the common law, every child (except the king's children) born out of the ligeance of the crown of England, was an

alien:

alien: otherwiſe why find it neceſſary to naturalize the perſons named in the act, and all future generations under the ſame cirumſtances, by theſe words, "Shall be from henceforth able to have "and enjoy their inheritances after the "death of their anceſtors in all parts "within the ligeance of England, as "well as thoſe that ſhould be born "within the ſame ligeance?" Now the difference here pointed out between perſons born within and without the ligeance of the crown of England, is, that the one by the common law, was capable of taking and enjoying an eſtate of inheritance in England, and the other was not. It is without queſtion, that the ability to take and enjoy an inheritance in England, comprizes the full extent of the benefit of being a natural born ſubject, to all intents, conſtructions and purpoſes whatſoever. Thus in the following caſe:* "Hull "and his wife brought a writ of dow-

* 3 Hen. 6. c. 55.

er;

" er : the tenant pleaded that the feme
" was an alien : the demandants reply,
" that in the reign of Henry 4, ſhe was
" enabled by act of parliament to pur-
" chaſe lands, tenements, &c. with
" which reply the defendant's council
" reſted ſatisfied, as if the replication
" expreſſed it ſufficiently that ſhe was
" naturalized, and thereupon demand-
" ed view."

Altho' it may appear to ſome perſons unqueſtionable, that by the common law of England, he only was a natural born ſubject, who was actually born within the ligeance of the king of England, yet have ſome eminent lawyers been of opinion, that this ſtatute of the 25th of Edward 3d, is merely declaratory of the common law :* and for this reaſon it behoves the author to be very explicit in his reaſons for ſupporting the contrary opinion.

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* An opinion of the late Mr. Pigott, written in in 1732. And the before mentioned ancient manuſcript.

It is obſerved by the author of a diſcourſe concerning treaſon and bills of attainder,* that until the reign of Henry the 5th, the method of making acts of parliament, was this, "A bill in the "nature of a petition was delivered "to the commons, and by them ſent "up to the lords; and there it was "immediately entered upon the lord's "rolls, where the royal aſſent was en-"tered alſo: and upon this as upon a "ground work, the judges uſed at the "end of the parliament to draw up the "ſubſtance of the petition and anſwer, "into the form of a ſtatute, which was "afterwards entered upon the rolls, "called the ſtatute rolls, which were "diſtinct from thoſe called the lord's "rolls, or the parliament's rolls. Up-"on the ſtatute rolls, neither the bill "nor the petition from the commons, "nor anſwer from the lords, nor royal "aſſent were entered; but only the "ſtatute as it was modelled and drawn "up by the judges. From this it is

* Pag. 72, 73.

"manifeſt

" manifeſt how neceſſary it is to peruſe " the petition upon which a ſtatute is " drawn, in order to underſtand an " old act of parliament."

The act of the 25th of Edward 3d, actually refers to the petition which *was put in the parliament in the 17th year of his reign, but was not then wholly aſſented to:* in fact it was at that time admitted and wholly aſſented to, that the children of the kings of England, in whatſoever parts they were born, whether in England or elſewhere, were and ſhould be capable of inheriting their anceſtors in England: but as to the children of Engliſh ſubjects born abroad, it was found ſo difficult to make and ordain a proper law upon the ſubject, that they were then contented to recommend it to the ſerious conſideration of the great men, prelates, commons, and lawyers, how ſuch an act ſhould be framed; as appears by the petition preſerved among the records of the tower, and publiſhed by Sir Robert Cotton. " Pour ceo

" que avant ſes heures grand doubt et
" difficultie ont eſtre entre les grandees
" de ceſt roialme et les commons auſi
" bien gentes de le commune et autres,
" ſi les enfans que ſoient nees in partes,
" ouſtre le mere devient poit heritage
" leures aprés le deces de leurs anceſ-
" tors in Angliterre, pur cauſe que
" certain ley na pas eſtre ſur ceo or-
" deyne ſe in arrere oy fuit demaund
" per le archeveſq: de Canter. a touts
" les prelats et gentes preſent in ce
" parliament, ſi les enfans notre ſieur
" le roy que ſoyent nees en partes, &c.
" en la ley ſerioint inheritors en Angli-
" terre, lex quex prelates et gentes
" cheſcun per lui examines; deveroit
" leurs reſpons d'une accorde; que il
" nad nul manner de doubt que les
" enfantes notre ſieur le roy quelque
" parte que ils ſoient nees, par deca la
" merr ou par de la, poit heretage de
" leurs aunceſtors: mes quant aux
" enfantes des auters il eſt que adviſe
" ales aux dits prelats et grands et auxi

" gents

" gents de ley illonques, preſents, que
" qui diverſe doubts teils acts ſi de-
" bates on impeachments ſoint miſes en
" lour heritages ils conviendront molt
" apenſor a ut que certain ley ſur ceo
" ſoit ordeyne et ceſt materie autre
" foits fut recité in le preſens notre
" ſeiur le roy et per eux touts uniment
" accord et aſſenter comme de ſouth,
" que des enfantes que notre ſeur le
" roy iluy ad doubte ne difficulte que
" ils ne ſorront inherits de quel parte
" que ils ſoit nees ; et en droit des
" autres enfants accorde et in ceſt par-
" lement, que ils ſoit nees en le ſervice
" le roy-mes pur ceo que le parlement
" et ore de parter, et ceſt beſoigne de-
" maund grand aviſement et bon deli-
" beration, conent el ſe purra meux
" faire et plus ſuerment per ouſtre
" tout mainere de impeachment cy,
" eſt accord, que le feſans de le ſtatute
" in ce caſe de remaine, tanque l'au
" prochin parlement, iſſent que ouſtre
" que tems cheſcun penſe com ſerra en
" ley purra eſtre ordeyne, et ſur ceo

 " ſont

" ſont les juſtices et autres ſages charges " per le roy et per les grands *."

The preamble of this petition ſpecially ſets forth, that the difficulties had ariſen upon the point *pur cauſe, que certeyn ley na pas eſtre ſur ceo ordeyne:* a certain proof, that no law then ſubſiſted, which gave the right of inheritance to perſons born out of the ligeance of the king: and if any ſuch there was, whence could ariſe a difficulty in framing a ſtatute merely declaratory of the old law? And in fact, if there had been any doubt at that time actually conceived, whether the children of ſubjects born out of the ligeance of the king were by the common law capable of inheriting their anceſtors in England, it would have been recommended to the prelates, peers and lawyers then preſent, to aſcertain, what the law of the land was in that reſpect: and not, how they ſhould frame a proper law upon the ſubject. *Que certeyne ley ſur ceo ſoit ordeyne: et*

* Cot. Ab. 38.

ceſt

ceſt beſoigne demaund grand aviſement & bon deliberation, conent el ſe purra meux faire, et plus ſuerment per ouſtre tout mainere de impeachment, &c.

The next point to be conſidered is, what was the miſchief and defect, for which the common law did not provide. My lord Coke obſerves, * "that the re- "hearſal or preamble of a ſtatute is a "good mean to find out the meaning of "the ſtatute, and as it were a key to "open the underſtanding thereof." The firſt thing which the legiſlature then had in contemplation was, that *great miſchiefs and damages had happened* to the people of the realm of England, as well becauſe that the ſtatutes ordained before that time had not been holden and kept as they ought to be, as becauſe of the mortal peſtilence that had then lately reigned.

From the firſt of theſe conſiderations, I can deduce no ſpecial motive in

* Co. Lit. 79.

the

the legiſlature for paſſing this ſtatute in particular, more than any other beneficial and popular act. * " It appears from the " hiſtory of thoſe times, that king Ed- " ward the 3d. granted above twenty " parliamentary confirmations of the " great charter: and theſe conceſſions " were commonly appealed to, as proofs " of his great indulgence to the peo- " ple, and his tender regard to their " liberties. But the contrary preſump- " tion is much more natural. If the " maxims of Edward's reign had not " been in general ſomewhat arbitrary, " and if the great charter had not been " frequently violated, the parliament " could never have applied for thoſe " frequent confirmations, which could " add no force to a deed regularly ob- " ſerved, and which could ſerve to no " other purpoſe, than to prevent the " contrary precedents from turning in-

* Hume Ed. 3. c. 16.

" to

"to a rule, and acquiring authority." Such frequent confirmations were then in fact as uſeleſs and nugatory, as if an annual act were now to paſs for the confirmation of the great charter: the humour of thoſe times, (in which the houſe of commons ſeemed firſt to have acquired any degree of conſequence or reſpect) required repeated and expreſs promiſes for the obſervances of all the laws, in which the liberties or advantages of the people were involved. I take theſe firſt words of the preamble then, to import no more, than as a popular act was intended to be paſſed, it ſhould not be violated as others of the like nature had been; by which means the miſchief and damages done to the people by the violation, exceeded the advantages derivable from the obſervance of them.

The next conſideration, which the legiſlature had in the preamble to this ſtatute, was becauſe of the *peſtilence that late reigned*. In the preceding year a deſtructive peſtilence pervaded this king-

kingdom, after having ravaged almoſt all Europe, and ſwept away in ſome few months about one third part of the inhabitants of this iſland.* 50000 perſons are ſaid to have died of it in the town of Norwich. Now as the welfare, power, and proſperity of a ſtate conſiſt in the number, induſtry, and abilities of it's ſubjects; ſo never could a more ſeaſonable occaſion have preſented itſelf for enlarging the benefit of the common law, in favor of thoſe children of Engliſh parents, who were or might be born out of the ligeance of the king of England; and who by ſuch their foreign birth, were by the common law excluded from thoſe inheritances, which very probably now (had they been capable of enjoying them) would have devolved upon them, by the deſtructive effects of this fatal peſtilence. The *miſchief and defect*

* Stowe's Survey.

therefore, *for which the common law did not provide*, was now become more viſible and more felt than at any time before, and conſiſted in this, that the heirs of the blood who otherwiſe (according to the law of the land) would have a right to inherit their anceſtor's lands, were by their foreign birth precluded from that benefit, and rendered uſeleſs members, and perhaps enemies to the ſtate. This muſt have cauſed jealouſies and differences in private families, and a public detriment to the ſovereign and the ſtate. And if a perſon, by reſiding in a foreign country for the conveniency of commerce, ſhould have acquired a fortune ſufficient to purchaſe an eſtate of inheritance at home, the very means by which he acquired the fortune, would be the cauſe why his iſſue, whom he may have had born abroad, could not ſucceed to his inheritance : and thus the fruit of many years labour and induſtry, might by the beggary of his own poſterity, only encreaſe the opu-

lence of a wealthy lord, or of the crown, by the eſcheat of the land for want of an heir.

The 3d thing to be conſidered, is, *what remedy the parliament hath reſolved and appointed to cure the diſeaſe of the common wealth.* The king's children not being ſubject to the diſeaſe, are declared to be out of the neceſſity of the remedy. At this early period, individuals had not learnt to apply to parliament for private redreſs or aſſurances: ſcarcely indeed had the legiſlature adopted a ſyſtematical mode of enacting public acts. However, being in this inſtance ſenſible of the urgency of the evil and the neceſſity of a remedy, they wiſely extended the benefit generally to all future generations; and in order to carry the remedy back to thoſe, who had contracted the diſeaſe, during king Edward the 3d's reign, before the paſſing of the act, Henry, the ſon of John de Beaumont, Elizabeth, the daughter of Guy de Bryant, and Giles, ſon of of Ralph Dawbeney, were naturalized, and

and a power was veſted in his then majeſty, to encreaſe the number indefinitely of ſuch, as ſhould be admitted natural ſubjects, though born under ſimilar circumſtances, by only naming them, *and other which the king will name.* I need but obſerve once more for all, that here the remedy applied ſufficiently denotes the diſeaſe: for vain would it have been to naturalize ſuch perſons by act of parliament, who were already natural born ſubjects by the common law. There does not appear in our books one act of parliament, before this, by which any alien was naturalized, or as this ſtatute of Edward 3d, expreſſed it, made capable of *demanding an inheritance within the ligeance of the king of England.*

Now for the full elucidation of the 4th point, viz. the true *reaſon and remedy*; it will be neceſſary for me to dwell minutely upon each phraſe of the following clauſe: ſince under this clauſe the right of being a natural born ſubject of England, hath been claimed

by all children born abroad of Engliſh parents, for about four centuries; and it may ſtill continue it's operation, whatever it be, to ſeveral individuals until this preſent hour.

Theſe words of ſuch momentous import and conſequence, are, "And that "all children inheritors, which from "henceforth ſhall be born without the "ligeance of the king, whoſe fathers "and mothers at the time of their "birth, be and ſhall be at the faith "and ligeance of the king of England, "ſhall have and enjoy the ſame benefits "and advantages, to have and bear "the inheritance within the ſaid ligeance, as the other inheritors aforeſaid in time to come; ſo always "that the mothers of ſuch children do "paſs the ſea by the licence and wills "of their huſbands."

By theſe firſt words, *all children inheritors*, the legiſlature did certainly mean no other deſcription of perſons than thoſe, who were in it's contemplation

plation at the time of making the law, and conſequently liable to the diſability, which it meant to remove, and capable of receiving the benefit and advantage, which it meant to grant. Still to adhere to my lord Coke's rule, we will recur to the ſtatute itſelf in the firſt place, which in the preamble ſaith, "That becauſe ſome people be in "doubt, if the children born in parts "beyond the ſea, out of the ligeance "of England, ſhall be able to demand "an inheritance within the ſame ligeance or not;" therefore it was ſubmitted to the conſideration of the legiſlature, whether or no ſuch perſons ſo born beyond the ſea without the ligeance of England, ſhould be made capable of demanding an inheritance within the ſame ligeance; and the reſult of their deliberation and conſideration, was a general naturalization act, by which they were in future enabled to have and to bear an inheritance in England, and conſequently to demand

it.

it. For an alien then was and ſtill is, as we have before ſeen, incapable of bringing a real action for lands of inheritance in England; and that, becauſe he is eſſentially precluded from the enjoyment of them; the law *nihil operatur fruſtra*, and therefore will not caſt a deſcent upon a perſon, who is by law diſabled to enjoy that, which otherwiſe might have devolved upon him. The perſons therefore intended to be benefited by this act, are indiſputably ſuch, who before it paſſed, were by the old law diſabled from demanding an inheritance in England, by reaſon of their having been born out of the ligeance of the king of England; but not generally every perſon who was ſo diſabled, but ſuch only who could *have and enjoy their inheritance after the death of their anceſtors*; which implies that the perſons to be benefited by the act, muſt have had anceſtors in England, from whom the eſtates ſhould deſcend: and conſequently that every

perſon

perſon, who has any anceſtors, from whom he could inherit, if born in England, ſhall when born out of the king's ligeance, of natural born ſubjects, claim the benefit of this act. For the obvious purport of the act, was to remove that diſability, which ſuch children having anceſtors inheritable in England, incurred by their foreign birth: ſo that when benefited by the act, they ſhould ſtand preciſely in the ſame condition, as if they had been born in England. If therefore we can ſettle, in what manner, and how far perſons born abroad would have been enabled, before that ſtatute, *to demand their inheritance after the death of their anceſtors in England*, if born here, (allowing the utmoſt latitude to the exception made in the ſtatute) we ſhall at the ſame inſtant determine who is or is not to be benefited under this general and firſt act of naturalization. It is an univerſally received maxim, that enabling and beneficial ſtatutes ſhall be conſtrued equitably and largely, and diſabling

diſabling and reſtrictive ſtatutes, ſhall be conſtrued literally and ſtrictly.

It is beyond a doubt, that no child born abroad, whoſe father and mother were aliens at the time of the birth of ſuch child, could claim the benefit of this act; for the 1ſt condition required by the act, is, that the father and mother ſhall be at the faith and ligeance of the king of England, which evidently cannot be ſaid of aliens: nor could ſuch a child of alien parents, although born in England, be properly ſaid to be able *to demand his inheritance after the death of his anceſtors:* for his father and mother being aliens could have no eſtate of inheritance in them, nor could he derive a title to any higher anceſtor but through the father or mother, and this could not be done at that time either by the common law or by ſtatute; and yet ſuch child of alien parents, born in England, was by the common law of the land, capable of taking an eſtate by purchaſe and of tranſmitting it by deſcent.

deſcent to his own poſterity: and in fact, his not being able to demand the inheritance of his anceſtors does not proceed from any actual diſability in himſelf to inherit, but becauſe he cannot derive his title except thro' his father or mother, neither of whom the law takes notice of in caſting a deſcent: but his blood has in it, the ſame heritable quality, as if his father and mother had been Engliſh: for that quality comes not to us from our parents, but ſolely from the place of our birth: * and therefore ſuch child of alien parents born in England, may inherit his brother or any other collateral anceſtor, where his title is not derived through either of his alien parents. This difficulty or objection to his claiming thro' his alien parents was removed by an act of king William, † made in the year 1700, which although it produ-

* Godfrey and Dixon Cr. Jac. 539.

† 11 & 12 William 3. c. 36.

ced no alteration in the effects of the 25th of Edw. 3d. yet, by introducing a change in the common law of descents, it becomes so connected with the subject of this investigation, that it will be necessary for me not to pass it over unnoticed. "Whereas divers persons "born within the king's dominions "are disabled to inherit and make their "titles by descent from their ances- "tors, by reason that their fathers and "mothers or some other ancestor (by "whom they are to derive their des- "cent) was an alien and not born with "in the king's dominions: for reme- "dy whereof it is enacted, that all and "every person or persons, being the "king's natural born subject or sub- "jects within any of the king's realms "or dominions, shall and may lawfully "inherit and be inheritable as heir or "heirs to any honours, manors, lands, "tenements or heriditaments, and "make their pedigrees and titles by "descent

" deſcent from any of their anceſtors
" lineal or collateral, although the fa-
" ther and mother or fathers or mo-
" thers or other anceſtor of ſuch per-
" ſon or perſons by from through or
" under whom, he ſhe or they ſhall or
" may make or derive their title or pe-
" digree were or was or is or are or
" ſhall be born out of the king's alle-
" giance, and out of his majeſty's
" realms and dominions, as freely fully
" and effectually to all intents and pur-
" poſes, as if ſuch father or mother or
" fathers or mothers or other anceſtor
" or anceſtors, by from thro' or under
" whom, he ſhe or they ſhall or may
" make or derive their title or pedi-
" gree had been naturalized or natural
" born ſubject or ſubjects within the
" king's dominions."

Now as this act of K. William hath no expreſs reference to the 25th of Edw. 3d, or containeth not a word about children born abroad having a right to demand an inheritance in Eng-

land, ſo it can never be taken to have either enlarged or reſtrained the naturalizing act of Edw. 3d, but leaving that act, as well as the common law to work its own effect, in veſting the general right or capacity to inherit in individuals, it produces that eſſential alteration in or rather contradiction to the common law of the land, in caſting deſcents, which argues no great depth of conſideration or legal knowledge in the framers of the act: and it is a matter moſt ſurprizing indeed, that a ſtatute ſo fraught with miſchief and ſo repugnant to the ſubſiſting rules of the common law, ſhould have remained for the greateſt part of an enlightened century unaltered and unrepealed. And hereto may be juſtly applied the remark of the late judge Blakeſtone *. "That it "hath been an ancient obſervation in "the laws of England, that whenever "a ſtanding rule of law, of which the

* Bl. Com.

"reaſon

" reaſon perhaps could not be remem-
" bered or diſcerned, hath been wan-
" tonly broken in upon by ſtatutes or
" new reſolutions, the wiſdom of the
" rule hath in the end appeared from
" the inconveniences, that have fol-
" lowed the innovation."

It is clear from the expreſs words of the preamble to king William's ſtatute, that by the common law, a perſon, though *born within the king's dominions, was diſabled to inherit and make his title by deſcent from his anceſtor, if his father or mother, or other anceſtor, by whom he was to derive his deſcent was an alien*: and the rule of law is ſtill the ſame that it ever was, that an alien is not noticed by the law, in tranſmitting a deſcent, according to the opinion of the court, in the famous caſe of the earl of Holderneſs, under the name of Collingwood and Pace, in which the lord chief baron Hale concurred in opinion with 7 of the judges, againſt 3 in the exchequer chamber, in a very long and learned argument: to which we

ſhall

ſhall frequently have future occaſion to refer.* "If the eldeſt ſon be an alien, "the law takes no notice of him; and "therefore as he ſhall not take by de- "ſcent, ſo he ſhall not impede the de- "ſcent to his younger brother." And again,† ſpeaking of the natural born ſons of alien fathers, he ſays, "for as "they are diſabled to make reſort to "their fathers, (*that is to derive their "their title either from or thro' their "fathers*) yet do they receive ſuch "a quality from their fathers, as "entitles them to be eſteemed ſons, "and therefore may be heirs to the "mothers, as was agreed." Now although this act of king William gave a right to the ſon of an alien father to have reſort to his father, if he choſe to make out his claim, ſtill the operation of the common law remained the ſame; and in the caſe above ſtated, upon the death of the father, the law (notwith-

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* Vent. † Sid. 200.

ſtanding

ſtanding the exiſtence of the eldeſt ſon) did in reality take no notice of him, but actually caſt a deſcent upon the younger : although the eſtate ſo caſt upon the younger ſon by the common law, was certainly defeaſible by the eldeſt ſon, by force of this ſtatute of king William. To ſhew the unlimited extent of the miſchief, with which this ſtatute was fraught, we need only recur to the above ſtated caſe of a father and two ſons, the elder alien, the younger a natural born ſubject ; If the elder brother, at the diſtance of 30 years, marries and dies, and his wife is delivered of a child in England, after the law had caſt the deſcent of the eſtate upon the younger brother, by the death of the father, then by the force of the ſtatute of king William, the child of the elder brother may derive and make good his title to the lands of his grandfather, through his father, though an alien, and ſo defeat the eſtate of his uncle, which the law caſt upon him, even before the

birth

birth of the claimant. However during the ſpace of 52 years, theſe miſchiefs were either not ſeen or not remedied: until by an act of his late majeſty,* the chief part of the inconveniency was removed.

The act recites, that, "Whereas "many doubts and inconveniencies may "ariſe upon the ſaid recited act (of "king William,) in caſe of perſons "gaining capacities to inherit and de- "rive their pedigrees by virtue of the "ſaid recited act, after the death of their "anceſtors, to whom they claim to be "heirs, whereby eſtates well veſted by "deſcent, mortgages, purchaſes, and "ſettlements, duly made, may be de- "feated; for remedy whereof, &c. It "is enacted, that the ſaid ſtatute of "William 3d, ſhall not extend or be "deemed, taken, or conſtrued to ex- "tend to give any right or title to any "perſon or perſons, to inherit as heir, "or heirs, or coheir or coheirs, to any

* 25 G. 2. c. 39.

"perſon

" perſon dying, ſeized of any manors,
" lands, tenements, or hereditaments,
" in poſſeſſion, reverſion, or remain-
" der, by enabling any ſuch perſon or
" perſons, to claim or derive his, her, or
" their pedigree, through an alien an-
" ceſtor, or anceſtors, unleſs the per-
" ſon or perſons ſo claiming or deriv-
" ing his, her, or their title, as heir or
" heirs, coheir or coheirs, was or were,
" or ſhall be in being, and capable to
" take the ſame eſtate, as heir or heirs,
" coheir or coheirs, by virtue of the
" ſaid ſtatute, at the death of the per-
" ſon who ſhall ſo laſt die ſeized of ſuch
" manors, lands, tenements, or here-
" ditaments, and to whom he, ſhe, or
" they ſhall ſo claim to be heir or heirs,
" coheir or coheirs, by force of the
" ſaid ſtatute."

But we muſt return to the conſide-ration of the words of Edward the 3d : *children inheritors*, is a general deſcrip-tion of all children capable of claiming and enjoying an inheritance, without ſpecifying in what particular country

this capacity ſhall ariſe; it became therefore neceſſary to reſtrain this general and unconfined meaning, leaſt the ſtatute ſhould be pleaded generally by any legitimate child of any country, who was capable of inheriting his anceſtor's landed property: the ſtatute therefore confines the benefit to ſuch children only, whoſe fathers and mothers were at the faith and ligeance of the king of England, at the time of their birth: thus readmitting to the participation of our laws and conſtitution, thoſe perſons, who had only, as it were, accidentally loſt the benefit and protection thereof, by their foreign birth; although by every tie of conſanguinity and ſociety, they muſt be ſuppoſed to poſſeſs an affection and regard for their country and government: ſo that thus naturalized, they might become in fact and law, as well as in heart and ſpirit, true native ſubjects.

Thus it is clear from the different parts of the ſame ſtatute, that the child of

of alien parents born out of the ligeance of the king of England, cannot be included in the words *children inheritors*, who are intended to be benefited by the ſtatute. In ſhort, the plain modern Engliſh of thoſe words of the 25th of Edward 3d, ſeems to be neither more or leſs than the *legitimate children of all britiſh ſubjects:* it is evident, that the legiſlature had the circumſtance of their legitimacy in contemplation, by ſpecially providing how the contrary ſhould be proved, if alledged againſt them: and it is concluſive from what has been heretofore proved, that no perſon out of the ligeance or dominion of the king, can owe him faith or ligeance, beſides his own ſubjects, who are therefore called his liege ſubjects or liegemen; and that ſuch liege ſubjects, in whatſoever parts they may be, or whatſoever engagements they may have aſſumed to foreign powers, muſt neceſſarily remain at the faith and ligeance of the king; for every man by his birth in this country, becomes a liege

ſubject to our king, nor ſhall he by any act of his own ceaſe to be ſuch a ſubject, while he has life.

A baſtard, ſays Littleton,* "Is "*quaſi nullius filius*, becauſe he cannot "be heir to any;" therefore ſuch can never be called *children inheritors*, even if born in England, for they cannot by poſſibility have any anceſtor lineal or collateral: and indeed the act makes a ſpecial proviſion how the baſtardy of children born abroad ſhall be proved. And yet may a baſtard born in England, take lands by purchaſe, and be inherited by and through the children of his own body.

Had the 4th of Geo. the 2d. never paſſed, it would have here been natural to conclude generally, that every child whoſe father and mother were not aliens, or who continued to owe the debt of allegiance to our king even

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* Lit. Sect. 188.

whilſt

whilſt reſiding within the ligeance of ſome foreign ſtate, might, if born within ſuch laſt mentioned ligeance, claim the right of being a natural born ſubject of England under the 25th of Edw. 3d, and the 7th and 10th of queen Ann. As the 4th of G. 2, has attempted to place the children born abroad of perſons attainted, or liable to be attainted, or ſerving a foreign enemy, on the ſame footing with the children of aliens and with baſtards, the force and operation of that ſtatute ſhall be the ſubject of our future enquiry; and for the preſent we will ſuppoſe that it never has been made: in fact, it expreſsly ſays that all ſuch children ſhall be and remain in the ſame ſtate, plight and condition to all intents, conſtructions and purpoſes whatſoever, as they would have been in, if the ſaid acts of the 7th of Ann and the 4th of Geo. the 2d had never been made. We muſt therefore in deference to this ſtatute of the 4th of Geo. 2d, examine whether the words

children

children inheritors in any ſhape exclude the children of ſuch parents, who are deſcribed in the 4th of Geo. 2d; viz: the children of fathers, 1ſt. attainted of high treaſon, 2dly. liable to the penalties of high treaſon or felony for returning into this kingdom or Ireland without licence, and 3dly, engaged in the ſervice of a foreign power at enmity with the crown of Great Britain.

It hath been ſaid that the law takes no notice of an alien * either in the tranſmiſſion or derivation of a title by deſcent; † *but it is, as if ſuch perſon had gone out of the way*, and hence ariſes " § the diſability that reflects from " an alien to one, that muſt derive by " or through him, though he per- " chance be a natural born ſubject." Such a child then, being at the time of

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* 1 Vent. 417. Doct and Stud.

† Cro. Jac. 539 and 22 H 6.

§ Vent.

making

making the ſtatute of Edward the 3d. and for ſeveral centuries afterwards, diſabled by the common law to demand an inheritance within the ligeance of the crown of England, could not evidently come under the conſideration of the Legiſlature. But there is a difference made by our law, between the children of attainted parents and the children of alien parents: although to ſome effects they are ſimilarly ſituated. * "The law looks upon "a perſon attaint, as one that it takes "notice of, and therefore the eldeſt "ſon attaint, overliving his father, "though he ſhall not take by deſcent "in reſpect to his diſability, yet he "ſhall hinder the deſcent of the young"ger ſon. But if the eldeſt ſon be an "alien, the law takes no notice of "him, and therefore as he ſhall not "take by deſcent, ſo he ſhall not im"pede the deſcent to his younger "brother."

* 1 Vent: 417.

My

My lord chief baron Hale in his argument upon the aforeſaid caſe of the earl of Holderneſs throws the whole matter into the cleareſt light. "The "diviſion of deſcents is of two kinds: "1ſt. lineal as from the father or "grandfather, to the ſon or grandſon; "ſecondly collateral or tranſverſal as "from brother to brother, uncle to ne-"phew or *e converſo*: and both theſe "again are of two ſorts: 1ſt. immedi-"ate, as in lineals from father to ſon: "2dly. mediate, as in lineals from "grandfather to grandſon, the father "dying in the life of the grandfather; "when the father is the *medium defe-"rens* of the deſcent: 3dly. in colla-"terals, from the uncle to the nephew, "or from the nephew to the uncle, "where the father is likewiſe the *me-"dium deferens.*"

It was before ſaid, that the children of alien parents could not be termed *inheritors*, becauſe they could not derive their title through an alien anceſtor: but this is to be underſtood only of

of lineal deſcents mediate and immediate; not of collateral or tranſverſal deſcents: for in the caſe of the earl Holderneſs, it was determined * that if an alien had two ſons born in England, and the one purchaſe lands and die without iſſue, the ſurvivor ſhall inherit the other; and the main ground of the judgment was, that the deſcent between the two brothers was an immediate deſcent. And it is there alſo holden "That the attainder of a lineal "anceſtor ſhall not hinder collateral "deſcents, as the attainder of the fa-"ther ſhall not hinder the deſcent "among brothers, and for this cauſe, "becauſe the father is not the *medium*, "through which the deſcent between "the brothers is derived, or rather, "the father is *medium deferens ſangui-"nem*, and the brother is *medium de-"ferens hæreditatem*."

"† Whenever the courts of law "have undertaken to decide any queſ-

* Sid: 198. 200. † Vent: ubi ſupra.

" tion concerning the incapacity of an " alien, or of the conſequential reſults " that ariſe from it, the law hath al- " ways been very gentle in the con- " ſtruction of a diſability, and rather " contracting it, than extending it ſo " ſeverely. And in Calvin's caſe, the " report is grounded upon this gen- " tle interpretation of the law, though " there were very witty reaſons alledg- " ed to the contrary." If therefore we are to follow the example ſet us by the courts of law, it will follow that all ſuch perſons, who by the common law would have been capable of inheriting lands in England, if born within the ligeance of the crown of England, by collateral deſcents, ſhall be included and comprized under the words *children inheritors*, (unleſs reſtrained by the ſubſequent condition of their father and mother being at the faith and ligeance of the king of England, and their mother having paſſed the ſea with the licence of her huſband,) and conſequently intitled to the

the full benefit of the general naturalization act of Edward 3d, in case they shall be born without the ligeance of the crown of England: for the capacity of inheriting collaterally, is one and the same as the capacity of inheriting lineally, and arises solely from the legitimacy of blood and the place of birth: in the case of a child of an attainted father and mother, what obstructs the lineal descent, is not any disability or incapacity in the child to inherit, but the corruption of the blood of each parent, which operates in them an impossibility to have an heir. To adopt any other idea of this matter, would be as absurd, as to say, that the inability of a grantor to make a grant, created an absolute disability in the grantee to take one.

It must be observed, that we have hitherto only treated of such children, whose fathers and mothers were both attainted. Such cases have seldom happened; though they may happen: but the cases have been very frequent,

where one only of the parents hath been attainted. It will be proper therefore to dwell for ſome time upon the conſequences of ſuch an attainder to the child of the attainted parent. Sir Mathew Hale ſays * "The conſe-"quence of the judgment in high trea-"ſon, is corruption of blood of the "party attaint: in ſo much that he neither ſhall be heir unto any perſon, or ſhall any perſon be heir unto or through him: and this active and paſ-ſive diſability, which the law creates in the party attainted, cuts off every poſſibility, that a title ſhould be derived to an inheritance, through that blood, which was once corrupted by the at-tainder; and even in caſe of his obtain-taining a pardon, his old bood ſhall not be reſtored; but as our law books ex-preſs it, he is thereby made a new man. "But ſays, Sir Mathew † "Hale, reſtitution of blood in it's "true nature and extent, can only be

* Hale's p. c. 1. 354. † Hale's pl. c, 1. 358.

"by

" by act of parliament, and reſtitutions " by parliament are of two kinds, one " a reſtitution only in blood, which " only removes the corruption thereof, " but reſtores not to the party attaint " or his heirs, the manors or honours " loſt by the attainder, unleſs it ſpe- " cially extend to it: the other is a " general reſtitution not only in blood, " but to the lands &c of the party at- " taint."

It is certain, that the doctrine of the relative effects of an attainder, has unaccountably retained a degree of apparent inconſiſtency and confuſion. For although the rules, principles and maxims of our law concerning them, are in themſelves clear and conſiſtent, and the determinations of the courts of law are pointedly deciſive in confirming and eſtabliſhing them; yet my lord Coke * in his comment upon Littleton, and after him moſt of the modern writers upon our laws, in deli-

* Co. Lit. 392.

vering

vering their own opinions, ſeem to have taken it for a ſettled point, that the effects of an attainder were to corrupt the blood, not only of the attainted perſon himſelf, *but of all above him and about him and of his children born at the time of his attainder.* "But * "by the pardon he was as a new crea- "ture, *tanquam filius terræ*, whoſe "blood upwards remains corrupted: "but for the iſſue had after the pardon "he is inheritable to his father; and if "his father had iſſue before the par- "don, and had iſſue alſo after and "dieth, nothing can deſcend to the "youngeſt, for that the eldeſt is living "and diſabled. But if the eldeſt ſon "had died in the life of the father "without iſſue, then the youngeſt "ſhould inherit." Such is the doctrine laid down by my lord Coke and adopted by moſt ſubſequent writers: it becomes eſſentially neceſſary for our purpoſe to examine how far it be eſ-

* Co. Lit. 391.

tabliſhed

tabliſhed or defeated by the determinations of the courts on the moſt ſolemn occaſions.

It is admitted by my lord Coke, as well as by all other writers upon our laws, that the perſon, whoſe blood is corrupted, can neither have an heir or be an heir: but if the *blood of thoſe above the attainted perſon, about him and of his children* be corrupted by the attainder, then can none of them either have an heir or be an heir: but the contrary hath already appeared, and will more fully appear hereafter, viz. that the father, brother, uncle, and ſon of an attainted perſon, are to all intents and purpoſes, capable of being heirs, and having heirs, lineally and collaterally, and that indefinitely as to all perſons whomſoever, except where it becomes neceſſary for them to reſort to the blood of the attainted perſon, in order to derive their title to the inheritance. By the attainder of a father, his moſt remote poſſible heir is as much affected as his eldeſt ſon: they are both

both for ever barred from taking an eſtate of inheritance, from or through him; but remain equally capable of taking an eſtate by deſcent, from and through all other perſons indefinitely.

Every perſon, ſays Siderfin,* in reporting my lord chief baron Hale's argument, in the famous caſe of the Earl of Holderneſs, has the like natural blood, which he receives from Adam; but it is the municipal law, which gives the heritable capacity: ſo that in England, it is the place of the birth joined with the natural blood, that gives the enabling quality to inherit: yet this natural blood muſt proceed from ſuch kindred as our law takes notice of: ſo a perſon born before marriage, hath not in him ſuch blood, as our law takes notice of, and therefore can he inherit to no perſon: a baſtard then muſt be the firſt of his family; for he cannot by poſſibility derive his title higher; for he can have no anceſtor lineal or

* Sid. 200.

collateral.

collateral. " But it is not ſo in the " caſe of the ſon of an alien, or of a " perſon attainted; for as they are diſ- " abled to make reſort to their fathers, " yet do they receive ſuch a quality " from their fathers, as intitles " them to be eſteemed ſons, and there- " fore may be heirs to their mothers, as " was agreed. And ſo lord Coke in " ſaying, that the *ſanguis duplicatus* was " abſolutely requiſite in every heir, " confutes himſelf, as appears by this " laſt caſe."

As the father then before the attainder did not give the heritable capacity to the blood of the ſon, but the place of his birth, ſo does he not by his attainder communicate unto, or create any diſabling quality in the blood of his ſon.* The caſe put by my lord chief baron Hale, and agreed to by the court is pointedly deciſive. " The " grandfather and grandmother, both " aliens, or attainted of treaſon, have

* Vent. ubi ſupra.

" iſſue, the father a Denizen, who hath
" iſſue, the ſon a Denizen, the ſon ſhall
" be heir to the father, notwithſtand-
" ſtanding the diſability of the grand-
" father : for they are not *medii ante-*
" *ceſſores* between the father and the
" ſon, but paramount ; and yet all the
" blood the father hath, he derived
" from his diſabled parents."

And again, " If the father be at-
" tainted, the blood of the grand-
" father is not corrupted, no nor the
" blood of his ſon, though he could
" not inherit him, but only the blood
" of the father : but that corruption of
" blood in the father draws a con-
" ſequential impediment upon the ſon
" to inherit the grandfather, becauſe
" the father's corruption of blood ob-
" ſtructs the tranſmiſſion of the heredi-
" tary deſcent between the grandfather
" and the ſon. And here we muſt take
" notice of a great diverſity between a
" diſability in the blood and a bar."

This will aſſuredly ſuffice to prove beyond any doubt, that the child of an

an attainted father, is by the law of this country capable of inheriting either lineally or collaterally, wherever he is not obliged to derive his title through his attainted father. For if ſuch ſon, by being a legitimate child, and born in England, is capable of inheriting generally, wherever there is no particular bar: it follows that he ſhall certainly inherit the lands of his mother, unleſs the attainder of the huſband ſhould cauſe a bar, or as lord Coke ſaid before, unleſs by *the attainder all the blood is corrupted, above him, about him, &c.* And if this doctrine ſhould be admitted, then muſt it again be ſaid, that my lord Coke confuteth himſelf, by reporting the following caſe: * "William Ocle, and Joan his wife, "purchaſed lands to them two and "their heirs: after William Ocle was "attainted of high treaſon for the mur "der of the king's father, Edward 2d, "and was executed. Joan his wife

* Co. Lit. 187.

 "ſurvived

" ſurvived him. Edward the 3d, " granted the lands to Stephen de Bit- " terley and his heirs. John Hawkins " the heir of the ſaid Joan, in a petition " to the king, diſcloſeth this whole mat- " ter, and upon a *ſcire facias* againſt the " patentee, hath judgment to recover " the lands." Now if, as we have proved before from lord chief baron Hale's argument, the child of an attainted father, receives or incurs no diſability in himſelf by the attainder of his father, *but may inherit his mother*; if Joan had left a ſon by William Ocle, he would have ſtood as heir at law to Joan, in the ſame ſituation as John Hawkins, who was a remoter heir, and been equally entitled to the lands of his mother: nor in order to recover them, would it have been more neceſſary for him than for a remoter heir, to derive his title through his father.

From what hath been ſaid, it is concluſively evident, that the child of an attainted father born in England, is to all intents and purpoſes in himſelf, capable

capable of inheriting lands in this country, and therefore comprized under the words, *children inheritors*, in the ſtatute of Edward the 3d; conſequently, if his father and mother were at the faith and ligeance of the king of England, at the time of his birth, altho' he were born out of the ligeance of the king of England, yet is he by the 25th of Edward the 3d, made capable of *bearing the inheritance after the death of his anceſtors in England*, as well as thoſe, who were born within the ligeance of the crown of England.

The next requiſite to entitle a child born out of the ligeance of the king of England, to the benefit of king Edward's act of naturalization, is, *that his father and mother, at the time of his birth be and ſhall be at the faith and ligeance of the king of England.* Now it hath been proved heretofore, that every perſon, who had contracted by birth, this debt of allegiance to his ſovereign, could never be releaſed from it, but by the expreſs conſent of the ſovereign,

or

or of the legiſlature, which has never been known to be done in any one inſtance whatſoever. It follows conſequently, that the benefit of this law of Edward the 3d, is evidently extended to the children born abroad of all parents indiſcriminately, who were by birth or otherwiſe, at the faith and ligeance of the king of England, or in other words were his liege ſubjects.

And this condition, which is in the nature of an exception, from the expreſs words, as well as from the ſpirit of the act, can only be conſtrued to extend to illegitimate children born out of the ligeance of the crown of England, and the legitimate children alſo born out of ſuch ligeance, whoſe parents were not the liege ſubjects of the crown of England: and upon theſe grounds did lord chief juſtice Huſſey ſay, *that this ſtatute treateth of liege ſubjects:* conſequently this exception could only go to exclude ſuch children from the benefit of the act, whoſe parents were not liege ſubjects of the crown of England.

Such

Such then was the policy of thoſe days, (which the legiſlature never found expedient to alter for near four centuries) not to admit a mixture of foreign blood into this kingdom, even under the neceſſity of replacing one third part of it's inhabitants, who had died the preceding year of the plague: thus not only excluding the children of foreigners, but alſo the children of many perſons of Engliſh extraction, who had been born under the ligeance of ſome foreign power. For if it were expedient to prevent the introduction of foreign manners, cuſtoms, habits, or connections, by naturalizing the children of foreigners, the ſame reaſons muſt have carried their weight proportionably againſt the children of thoſe Engliſh families, which had reſided for above one generation in foreign parts.

It will not be too great a preſumption to aſſert, that our anceſtors were generally not only more ſparing of their words in enacting laws, than their poſterity; but alſo more attentive to their real

real import and meaning. There is no room for a doubt, but that, if the legiſlature had intended to exclude the the children of attainted perſons born abroad, from the benefit of that naturalizing act, they would have expreſsly excepted thoſe children, whoſe fathers and mothers at the time of their birth, had forfeited or were not entitled to the benefit of the protection of the king of England: it is warrantable to ſay, that the parliament ſitting in the 25th year of the reign of king Edward the 3d, were clearly and fully aware of the diſtinction between perſons *at the ligeance and perſons intitled to the protection of the king*; for in another act, * paſſed in that ſame year, it is ſaid, that perſons attainted in a premunire, ſhall be out of the protection of the king, *hors de la protection notre ſiegnur le roy*:

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* 25 Edward 3. ſt. 5. c. 22.

but

but it ſays not, that they ſhall not be at the faith and ligeance of the king; for a liege ſubject may certainly forfeit his right to the protection of the king, but he cannot by his own crime deſtroy the right of ſovereignty, which the king hath over him as a liege ſubject.

This act of Edward the 3d, was the firſt act of naturalization made by parliament; and the proof that it was not paſſed ſlightly or without conſideration is, that for near three hundred and threeſcore years, during the greateſt variety of changes and revolutions in the manners, policy, wealth, power, extent of dominion, alliances, religion, and government of this country, the legiſlature never found it neceſſary to enlarge, reſtrain, explain, alter, or repeal it.

The ſole difference between a general and a private naturalization act, is, that the former applies it's effects to all perſons indiſcriminately, who ſhall be

found under the circumſtances requir-ed by the act, to intitle them to the be-nefit thereof: and the latter undertakes to examine into the qualifications and circumſtances of the individuals, to whom it applies it's effects. What my Lord chief Baron Hale * in the ſaid caſe of the Earl of Holderneſs ſaid, is appli-cable both to a general and private act of naturalization: "Naturalization, "according to our law, can only be by "parliament, and not otherwiſe: and "it doth doubtleſs remove that inabi-"lity and incapacity, that is in aliens, "in reſpect of themſelves, and ſo put "them in the condition, as if they had "been born in England." Now the ſole inability or incapacity to inherit, that can exiſt in any perſon, muſt ariſe from one of theſe three cauſes, viz. from a want of legitimate blood, from the place of birth, or from attainder, outlawry, &c. The act of Edward the 3d, undertakes to remove the inca-

* 1 Vent. 419. 420.

pacity

pacity arising from a foreign birth; and if after the removal of that impediment by act of parliament, the child could have enjoyed the inheritance of his anceſtors in England, then will he, if born out of the ligeance of the crown of England, be undefeaſibly intitled to the benefit of the 25th of Edward 3d.

In what then does this benefit conſiſt? In this: that from the paſſing of the act of the 25th of Edward the 3d, all children born under the circumſtances aforeſaid, out of the ligeance of the king of England, "*ſhall have and enjoy* "*the ſame benefit and advantages, to have* "*and to bear the inheritance within the* "*ſame ligeance, as the other inheritors* "*aforeſaid in time to come:*" in other words, ſuch children ſhall be to all intents and purpoſes, natural born ſubjects of England. But it ſeems to qualify the capacity by the relative words, *as the other inheritors aforeſaid;* which words muſt evidently be referred to Henry de Beaumont, Elizabeth de Bryan, and Giles Dawbeny, who were born

beyond the ſea out of the ligeance of the crown of England, and are qualified by this act of naturalization (for to them it was as a particular and private act, though general and public to all future generations) to have and enjoy their inheritance after the death of their anceſtors, in all parts within the ligeance of England, as well as thoſe, which ſhould be born within the ſame ligeance.

There is ſtill one other qualification made requiſite by the ſtatute, to intitle a child born abroad to the benefit thereof: and this is, that the mother do paſs the ſea by the licence and will of her huſband.

It appears wholly unaccountable that a court of law ſhould have extended the penal effects of the 5th of Richard the ſecond, ſo as to make the children born out of the ligeance of the crown of England to be aliens, whoſe parents went abroad without the licence, which was required by that act: when the act particularly limits the penalty

to

to the forfeiture of the perſonal eſtate: the reporter of the following caſe gives no reaſon or ground for the opinion of the court: although he particularly ſtates it to have been given againſt the opinion of Huſſey.

* In the caſe of Hyde and Hill "It "was held upon evidence, that if ba- "ron and feme Engliſh go beyond the "ſea without licence, or tarry there "after the time limitted by the li- "cence, and have iſſue, that the iſſue "is an alien and not inheritable, con- "trary to the opinion of Huſſey 1 "Ric. 3. 4." This caſe was adjudged in the 24th year of queen Elizabeth's reign, at the time when licences to go out of the kingdom were neceſſary, that is, between the 5th year of Richard 2d. and the 4th of James the 1ſt.

There having been no reaſon or ground given of this judgment, it becomes extremely difficult at this diſ-

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1. Cro. 3.

tance

ſance of time and when the leading circumſtance, viz. the neceſſity of a licence, hath ceaſed to exiſt, to alledge the real motives and reaſons of the court for ſuch a determination. If the author may be permitted to hazard his idea upon the ſubject; the court muſt have held, if the report be true, that the condition of the wife's paſſing the ſea with the will and licence of her huſband, was incompatible with the want of the king's licence for either of them to leave the kingdom; and thus was the 5th of Richard 2d made to controul that condition of the 25th of Edward 3d: but as the 5th of Richard 2d, hath been long ſince repealed, the determination of this caſe cannot in any manner affect thoſe children born abroad, whoſe parents did not require a licence to quit the kingdom.

It has been before remarked, that the conſtructions of this ſtatute had always been very favourable, rather extending

extending than reſtraining the benefit thereof. Thus for example, it ſeems at firſt view natural to underſtand, by the words of the ſtatute, *fathers and mothers &c.* that it is requiſite that both father and mother ſhould be at the king's ligeance, or in other words, his majeſty's liege ſubjects: and that the legiſlature particularly ſeemed to conſider the mother as ſuch, by annexing the condition of her child's capacity to inherit, to her huſband's conſent and licence to quit the realm: and yet it hath been adjudged, that the child of an Engliſh man and a Poliſh woman born out of the ligeance of the king ſhall be able to inherit lands in England *: the reporter of that caſe has theſe remarkable words "Pluſors des "judges teigne que les parols in 25th "Edward 3d. *de natis ultra mare*, "whoſe *fathers and mothers* be or "ſhall be at the faith and ligeance of

* Lit. Rep. 23.

"the

" the king, ſera priſe diſtributivè non " copulativè, *fathers or mothers.*" This caſe of the king and Eaton was adjudged in the 2d. year of king Charles the 1ſt; and another almoſt ſimilar caſe of Bacon and Bacon † was adjudged in the 16th year of king Charles the 1ſt.

But the learned argument of Lord Chief Baron Hale in the caſe of the Earl of Holderneſs, which was determined in the 16th year of the reign of king Charles the 2d. has thrown ſo much light upon the queſtion, that the principle, upon which the reporters of both the caſes of the king and Eaton, and Bacon and Bacon, found the judgment of the court, is entirely over ruled and done away by this ſubſequent determination. It is indeed ſaid in both thoſe caſes, that if the mother had been Engliſh and the father foreign, then would

† Cro. Car.

not

not the iſſue have been a natural born ſubject: but as this was not the matter before the court, and is only a dictum grounded upon an erroneous principle, it can retain no degree of authority whatever. It is evident, that in order to give any degree of effect in this caſe, to the principle, *partus ſequitur patrem*, it muſt be admitted, that the father communicates the heritable quality to the blood of his child: now the contrary has been manifeſtly proved, that the child derives no other quality of blood from his parents, than that of legitimacy, which is the firſt neceſſary required by our law, to make his blood heritable: and this heritable capacity he derives ſolely from the place of his birth: this is clear from the caſe of a child born in England, either of two alien or attainted parents: the blood of the child is in itſelf inheritable actively and paſſively, and yet none of the parents had any heritable blood in

them to give. The only caſe, to which this principle ever ought to have been applied in our law, is, where the child derives his nature or condition from his father, as in the old feodal tenures he did that, either of a freeman or a villain. * The principle then, that *partus ſequitur patrem* can only hold in thoſe things, which the iſſue derives from the father; but he does not derive the heritable capacity of his blood from the father, therefore the principle is not applicable to the caſe of a child's claiming a right to inherit, becauſe his father had that right in him.

I can find no caſe in the books, in which it hath been adjudged, that the wife being Engliſh and the huſband an alien, their iſſue born abroad ſhall inherit: or indeed, where the

* It is ſurprizing how the late judge Blackiſton and many other writers ſhould have adapted this principle to the caſe of aliens and Denizens, and to the children of attainted parents.

contrary

contrary hath been expreſsly determined: for the dicta, which are frequent in the reporters, that ſuch would be the caſe, being evidently grounded in the aforeſaid maxim, that *partus ſequitur patrem*, are totally impertinent to the point in queſtion. Nor will it be leſs difficult to ſhew the force of the other reaſon, *quia fœmina eſt ſub poteſtate viri*, which is alledged by the reporters, why the benefit of the 25th of Edward 3d, ſhould not extend to the iſſue of an Engliſh mother, as well as to the iſſue of an Engliſh father: for by blood, one is as much Engliſh as the other: and the king having equal right and intereſt in the allegiance of them both, as alſo to that of both their children, if born in England, may prevent the one as much as the other from going out of the kingdom: and it is equally neceſſary that the children of an Engliſh mother, as thoſe of an Engliſh father ſhould have anceſtors within the ligeance

ance of the crown of England, whoſe inheritances they might bear after their deceaſe; and ſuch, it appears, were the perſons, intended to be benefited by the 25th of Edward the 3d.

It may ſeem needleſs to conſider, how the child of an Engliſh mother and alien father born abroad would be benefited under the 25th of Edward 3d, as the matter is made clear by the 4th of George the 2d, that at preſent, every child born abroad, whoſe *father* was a natural born ſubject of Great Britain, ſhall be a natural born ſubject to all intents and purpoſes whatſoever: but as the 4th of George the 2d, has attempted to place ſeveral deſcriptions of perſons out of the effects of the 7th and 10th of queen Ann and the 4th of George the 2d, it is in conſideration of ſuch perſons, that we take the matter under our thoughts; for they are to be, according to this laſt act of George the 2d, in the ſame ſtate plight and condition, in which they would have

have been, in caſe theſe later acts had never been made, and therefore in the ſtate of making their claims under the 25th of Edward 3d.

As the caſe then hath not as yet received a judicial determination, it is to be preſumed that the courts would certainly be guided in the conſtruction of that act, by the ſpirit of lenity which produced the deciſions already mentioned, and give every weight they could to the opinion and doctrine of Lord chief Baron Hale, laid down in his argument of the caſe of the Earl of Holderneſs. The only inſtance, in which I can find, that this caſe came before the court and received any ſort of determination, was in this very caſe: and as much of it, as relates to the point in queſtion, is as follows.

Robert Ramſey a Scotch alien, had in the time of Elizabeth four ſons, alſo aliens born.

1ſt, Robert, who had iſſue three daughters.

2d,

2d, Nicholas, who had iſſue two ſons, Patrick and William.

3d, Sir John who had no iſſue.

4th, Sir George who had iſſue John.

Before Sir George the 4th ſon had any iſſue, he was naturalized by a private act of parliament: as was alſo the 3d ſon Sir John (afterwards created Earl of Holderneſs:) and it being the queſtion, whether John the ſon of Sir George ſhould inherit the lands of his uncle John Earl of Holderneſs, my Lord chief Baron Hale, thus expreſſes himſelf upon the ſubject; which, though not immediately before the court for its decision, yet came to be involved in the general queſtion.

* "Before I come to the argument "of the queſtion, the verdict had "need be delivered of a queſtion, "which poſſibly would make an end "of the diſpute."

"It hath been ſaid, that if the "wife of Robert were an Engliſh wo-

* Vent: ubi. ſupra.

"man,

" man, there would be no queſtion, but " the land might deſcend between the " brothers John and George, though " Robert the father were an alien; " and that it ſhall be ſo intended, becauſe " nothing appears to the contrary.

" To this I ſay,

" It is true, that if the mother were " an Engliſh woman, the deſcent from " John to George his ſon would be un- " queſtionable, for notwithſtanding the " incapacity of Robert the father, by " being an alien, they might inherit " their mother, and conſequently they " might inherit one the other."

This appears to be very deciſive of the point in queſtion with us, viz. that the child born out of the ligeance of the crown of England, of an Engliſh woman, ſhould inherit his mother, tho' his father were an alien: for ſuch was the caſe then in the conſideration of the court: but as the reporter Ventris, makes the Lord chief Baron continue his argument, it carries with it ſuch an inexplicable degree of inconſiſtency, as

to

to this point, as obliges us to conclude, that the dictum put in the mouth of the chief Baron, was an inaccuracy in the note taken of the case, or an insertion made by the editor of the report: and indeed considering the method, in which notes are taken in the courts, and reports are afterwards published from them, it is no wonder, that errors, inconsistencies, and inadvertencies so frequently occur in the reports of cases and arguments; and it is certainly justifiable, when the opinion of the court is clear, as to the matter before them, and dubious and contradictory, in a dictum upon the case, to attribute such obscurity or contradiction to the reporter, and adhere to the words, doctrine, and opinion of the court upon the matter before them, in which there is no ambiguity, obscurity, or repugnancy. Upon this principle then, must be rejected the latter part of the following paragraph, as a dictum absolutely contradictory to the before recited words of the chief Baron's argument.

"It

* " It hath been endeavoured to be " anſwered, that it is not poſſible that " the mother could be an Engliſh wo- " man, becauſe the ſons are found " to be aliens. But that will not be " ſo ; although an Engliſhman marry " an alien beyond the ſeas, and having " iſſue there, the iſſue will be Deni- " zens, as hath been often reſolved ; " yet it is without queſtion, *that if an* " *Engliſh woman go beyond the ſeas, and* " *marry an alien, and have iſſue born be-* " *yond the ſeas, the iſſue are aliens : for* " *the wife was ſub poteſtate viri, and yet* " *the iſſue born in England ſhould inherit,* " *though the huſband be an alien.*"

" But the true anſwer is, that in this " caſe, Robert the huſband being an " alien, born out of the ligeance of the " crown of England, and marrying, " and having all his iſſue born there, " ſhe ſhall not be preſumed an Engliſh " woman, but ſhall be preſumed a na- " tive of Scotland, where her huſband

* Vent. ubi ſupra.

' lived and had iſſue, unleſs the contra-
" ry had been expreſsly found."

Now if my Lord chief Baron had been of opinion, that without queſtion, Mrs. Ramſey being an Engliſh woman, and having married an alien, and having iſſue born without the ligeance of the king of England, ſuch iſſue were aliens; it would be the extremity of abſurdity and contradiction, for him to ſay, *that finding the mother to have been an Engliſh woman, would have poſſibly made an end of the diſpute; and that it is true, if the mother were an Engliſh woman, the deſcent from John to George, his ſon would be unqueſtionable; for notwithſtanding the incapacity of Robert the father, by being an alien, they might inherit their mother;* and again, *that ſhe ſhall be preſumed an alien, unleſs the contrary had been expreſsly found.* Now the doctrine ſo clearly and pointedly delivered in the reſt of the caſe, that the place of birth alone could give a right to inherit, and the congruity of the whole of the argument, (except that one

one dictum or ſuppoſition) fully evince the opinion of the Lord chief Baron on the matter. For if at all events her iſſue born in Scotland, were aliens, becauſe their father was an alien, how could the finding the mother to be an Engliſh woman, put an end to the diſpute, which was upon the capacity of the natural born children of aliens, inheriting to each father collaterally. Therefore unleſs there has been ſome later caſe determined, in which this point has been expreſsly decided to the contrary, it muſt be admitted to be law, that before and independantly of the 7th and 10th of queen Ann, and the 4th of Geo. the 2d, the child of an Engliſh woman and an alien father, born abroad or out of the ligeance of the king of England, was and is, (to uſe the chief Baron's words) *capable of inheriting his mother*, and conſequently a natural born ſubject of England to all intents, conſtructions, and purpoſes whatſoever: and this by force of the 25th of Edward 3d, which

removed the disability, which was incurred by the foreign birth of the child, and made him capable of demanding his inheritance after the death of his ancestors in England. Thus far have we traced the effects of the 25th of Edward the 3d, and we have been the more particularly minute in the search, because the 4th of George the 2d, has endeavoured to place several descriptions of persons out of the reach of the 7th and 10th of queen Ann, and the 4th of George the 2d: it will be the remaining task to examine and disclose the force, operation, and effects of these three later statutes.

The first and general intent of the 7th of queen Ann, was to encrease the population of the country, and advance the profession of the protestant religion, as appears by the preamble of the act: "Whereas the encrease of people is a "means of advancing the wealth and "strength of a nation; and whereas "many strangers of the protestant or "re-

" reformed religion, out of a due con-
" ſideration of the happy conſtitution of
" the government of this realm, would
" be induced to tranſport themſelves
" and their eſtates into this kingdom, if
" they might be made partakers of the
" advantages and privileges, which the
" natural born ſubjects do enjoy, &c."
And therefore it naturalizes every foreigner of every denomination and deſcription whatſoever, who ſhall ſubſcribe to the oaths, read the declaration, and receive the ſacrament of the lord's ſupper in the church of England: and in this act, is inſerted the before mentioned clauſe, which enlarges in ſome manner the 25th of Edward the 3d. The repeal of this ſtatute, as to it's naturalizing foreign proteſtants within 3 years, viz. by the 10th of Ann, verifies the obſervation of Judge Blackiſtone, upon every attempt to alter the old law: I call it the old law, becauſe, although in itſelf it was a ſtatute enlarging the common law, yet having ſtood

the

the teſt of ſo many centuries, and thoſe fraught with ſuch a diverſity of revolutions, it juſtly deſerves the appellation. But then, the clauſe for naturalizing the children of natural born ſubjects, born out of the ligeance of the crown of of England, ſtill retains it's force, as to the nation at large. The words of the 7th of Ann, *the children of all natural born ſubjects*, are general words, without any condition, exception, or reſtriction, and extend much more largely than the words of Edward the 3d, children inheritors, whoſe fathers and mothers be and ſhall be at the faith and ligeance of the king, at the time of the birth of the child, and whoſe mother muſt have the licence of her huſband to paſs the ſea. It will be needleſs for me to point out, what particular inconveniencies were felt by the legiſlature, from this general naturalizing clauſe of the 7th and 10th of queen Ann: it is plain they found it too general, and therefore undertook to explain it by the

the 4th of king George the ſecond.* From Magna Charta to the laſt act paſſed in this ſeſſion of parliament, there is not a ſtatute of ſo ſingular a tendency, as this ſtatute of the 4th of king George the 2d: this will appear in the cleareſt manner, as we advance in the expoſition of the nature and operation of it. The fortunes of many individuals, as well as their claim to the

* It is a matter well worthy the conſideration of the legiſlature, how they permit the law to remain as it now ſtands: it is clear that every American born within our former colonies, is now and for ever will be a natural born ſubject of Great Britain, and capable of inheriting lands in England: and by the 7th and 10th of Ann, every child born of natural born ſubjects out of the ligeance of the king of England, is a natural born ſubject himſelf to all intents, conſtructions, and purpoſes whatſoever; thus by the continuing operation of theſe ſtatutes, the Americans in *infinitum* will be entitled to the rights of britiſh ſubjects, whilſt we receive no ſort of compenſation from them, for admitting them to ſuch beneficial participation of our laws."

moſt

moſt valuable rights and liberties of our laws and conſtitution depend upon it. That there is a common law, and a written law of this country, no man will deny; and it will be as readily admitted, that by both or one of them, the right of every man ſhall ſtand or fall. It is undeniable, that the wideſt extent of human power over creatures, is veſted in the parliament of Great Britain, over all britiſh ſubjects: and that if parliament will poſitively enact a thing that is unreaſonable, yet is there no power upon earth which can controul it. Even the common law of the land gives place to a ſtatute: yet when a ſtatute is once made, it's operation ſhall be ruled by the living voice of the law, which are the deciſions of the courts of juſtice; and theſe deciſions are governed by certain rules of uniformity and conſiſtency, founded upon their own precedents.

The moſt enthuſiaſtic aſſertors of parliamentary prerogative, have never attempted to inveſt them with the attribute

bute of infallibility. In fact, if omiſſions, difficulties, uncertainties, inconveniencies, repugnancies, and contradictions, could not be found in ſtatutes, explanatory, enlarging, reſtraining, and repealing acts would have no exiſtence. And the language of our courts of law is deciſive upon the ſubject.* "It appears in our books, that in many "caſes the common law will controul "the acts of parliament, and ſometimes "adjudge them to be utterly void: "for when an act of parliament is "againſt common right and reaſon, or "repugnant or impoſſible to be per-"formed, the common law will con-"troul it, and adjudge ſuch act to be "void." It being then the doctrine of our law, that an act of parliament may be againſt common right and reaſon, and may contain a repugnancy or impoſſibility, and may be therefore avoided; every attempt to elucidate the law and to eſtabliſh the rights and liberties

* Rep. S. 118. Dr. Boncham's Caſe.

of our countrymen, ſhould be ſupported by all true patriots. It is the quintceſſence of our conſtitution, that no man ſhall be injured or deprived of his property, rights and liberties, any more than of his life, without cauſe; this cauſe muſt appear from the expreſs words of the law. Nay even Mr. Locke* goes further in aſſerting, "that "the ſupreme power cannot take from "any man, any part of his property "without his own conſent: for all the "power the government has, being on-"ly for the good of the ſociety, as it "ought not to be arbitrary and at "pleaſure, ſo it ought to be exerciſed "by *eſtabliſhed* and *promulgated* laws: "that both the people may know their "duty, and be ſafe and ſecure within "the limits of the law, &c."

It would be derogatory from the dignity of the conſtitution, to ſuppoſe that the great charter of our liberties had loſt any degree of force and effect ſince

*Locke 2d treatiſe concerning government, ſect. 138.

the

the celebrated Algernon Sidney ſaid: "* Magna Charta inſtead of being ſu-"perannuated, renews and recovers it's "priſtine ſtrength and athletic vigor, "by the petition of rights with our "many explanatory or declaratory ſta-"tutes." To uſe therefore the language of the bill of rights, *it is the true ancient and indubitable right and liberty of the people of this kingdom, that the following part of Magna Charta ſhall be firmly and ſtrictly holden and obſerved*; † "No freeman ſhall be taken, or impri-"ſoned, or be diſſeized of his freehold, "or liberties, or free cuſtoms, or be "outlawed or exiled, or any other way "deſtroyed; nor will we paſs on him "or condemn him, but by the lawful "judgment of his peers, or the law of "land. We will ſell to no man, we will "not deny or defer to any man either "juſtice or right." Under the ſancti-

* General view of government in Europe, ſect. 4.

† Magna Charta, c. 29.

on then of the higheſt authority, that an act of parliament may be againſt common right and reaſon, and repugnant and impoſſible, and therefore of itſelf void, and that juſtice and right will not be denied or even deferred to any man who claims it, we ſhall proceed with confidence and ſafety in our purſuit. The aſſertion of the rights and liberties of the ſubject, is an undertaking, againſt which no briton ſhall dare to ſet his face: every man ſhould adopt the maxim, *fiat juſtitia, ruat cælum.*

The principles, upon which a free man aſſerts his claim to the rights and liberties of the laws and conſtitution, cannot be too clearly expreſſed. An act of parliament which is beneficial to the generality of the nation, and contains an exception of certain deſcriptions of perſons, ſhall be conſtrued largely for thoſe, to whom it is beneficial, and ſtrictly againſt thoſe, who are comprized in the exception; for to them the ſtatute is reſtrictive and diſabling.

And

And in theſe later caſes, it is not ſufficient to find out the intention of the legiſlature, to exclude certain individuals from the general benefit accruing to the reſt of the nation, and thus to ſubject them to an actual reſtriction or diſability; but the act muſt contain words, which are unequivocal, expreſs, conſiſtent, and operative for the purpoſe intended. Thus was the legiſlature's intention ſufficiently clear in the 1ſt of Edward the 4th, that every man who ſhould be convicted of horſe ſtealing, ſhould not have the benefit of clergy; but becauſe the ſtatute uſed the word *horſes*, therefore the judges conceiving that this did not extend to him, who ſtole but one horſe, adviſed a new act for that purpoſe, which was accordingly made in the following year. And it muſt adminiſter real comfort to every perſon, who tenders the liberty of the ſubject, to reflect and perceive that the law hath been uniformly ſteady in it's effects during the continuance of

ſeveral

ſeveral centuries. Thus to come nearer to our own times; * the intention of the legiſlature was manifeſtly clear, in attainting Thomas Gordon, Lord of the Achintoule, of high treaſon, to attaint that Gordon, Lord of Achintoule, who had been guilty of rebellion; and this was the more palpable, as there was no other Lord of Achintoule then exiſting; but as the name of the Lord of Achintoule, who had committed treaſon, was *Alexander*, and he was by miſtake in the act, called *Thomas*, therefore was the act of attainder judged to be void, and the perſon, who was publickly known to have committed the treaſon, was preſerved from the penalties intended to have been inflicted upon him by the act of attainder, by force of the common law of the land, which has eſtabliſhed the rule, that *penal diſabling and reſtrictive ſtatutes ſhall be conſtrued ſtrictly*. For ſays the reporter

* 1 P. Willms. 616.

of

of the caſe " As to what is ſaid, that " this being an attainder by parliament, " differed from an outlawry, and that " the courſe of parliament made it " good; it was anſwered, that im- " peachments in parliament differed " from indictments, and might be juſti- " fied by the law and courſe of parlia- " ment; but that there was no other " method of conſtruing an act of par- " liament (as this was), but according " to law."

It cannot certainly be ſaid, that the intention of the legiſlature was in this inſtance doubtful or obſcure: for it appears by my lord Coke * " That if " lands be given to Robert earl of " Pembroke, where his name is Henry, " to George biſhop of Norwich, where " his name is John &c: for in theſe " and the like caſes, there can be but " one of that dignity or name; and " therefore ſuch a grant is good, albeit " the name of baptiſm be miſtaken."

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* Co. Lit. 3.

Now

Now the intention is equally clear, in the act of the attainder, as in the grant: but the difference is; the one ſhall be conſtrued ſtrictly and according to the letter, and the other largely and by equity.

If the law then ſhall protect even the guilty from puniſhment and diſabilities, for want of expreſs conſiſtent and operative words in a penal or diſabling ſtatute, how much more tender ſhall it be of excluding innocent and unoffenſive perſons from their property and their rights and liberties, as Engliſhmen, when the words of the diſabling ſtatute are ambiguous obſcure or repugnant.

This ſtatute of the 4th of George 2d, recites "That ſome doubs had "actually ariſen upon the conſtruction "of the aforeſaid clauſe of the 7th of "Queen Ann: and for explaining the "ſame and to prevent any diſputes "touching the true intent and mean-"ing thereof," thea ct wasmade: from which preamble we ſhould be induced

to

to ſuppoſe that the act was merely explanatory of that clauſe of the 7th of Queen Ann. But the contrary, I apprehend, will clearly appear.

An explanatory ſtatute may be ſtrictly defined; an act of parliament, which maketh no new law, repealeth no former law, nor enlargeth or contracteth the law explained. Every explanatory act differs alſo from a declaratory act: the latter only declares by ſtatute that, which before ſubſiſted by common law: the former eſſentially imports a reaſonable degree of poſſible doubt, ambiguity, difficulty or obſcurity in the act explained, or, that it had actually been miſconceived or miſconſtrued. Thus in the clauſe of the 7th of Queen Ann, it is a reaſonable doubt, whether the words, *children of all natural born ſubjects*, ſhall not extend to every child of every natural born ſubject, or only to every child whoſe parents were both of them natural born ſubjects. The explanatory law then ſets the matter out of all

doubt, by rejecting both theſe ſenſes: and declaring the meaning to be, that every child, born abroad, ſhall be intitled to the benefit of the act, whoſe *father* was a natural born ſubject at the time of the birth of the child: thus not requiring the ligeance of both parents, nor yet being ſatisfied with the ligeance of the mother alone; and ſo far this firſt clauſe of the 4th of George 2d is ſtrictly explanatory.

When a ſtatute has been explained, the law is ſtrictly the ſame as it was before the explanation, neither repealed, enlarged or reſtrained: and the explaining act and the act explained, make but one law, and the new explaining words are taken as the words of the act explained, and as it were incorporated with it and ſubſtituted in lieu of the doubtful, ambiguous, obſcure or deficient words thereof. Thus from the paſſing of the 4th of George the 2d, any perſon born out of the ligeance of the crown of Great Britain, claiming the benefit of that act,

needs

needs only to prove that at the time of his birth, *his father* was a natural born ſubject; and no body can ſet up a juſt claim unto it, whoſe father was not ſo: and if at any time between the paſſing of the two acts, that is, from the year 1708 till the year 1731, any caſe had been determined to the contrary of this explanation, ſuch determination would loſe all its force, and be no longer law: for an explanation is nothing more or leſs, than the expoſition of the ſenſe, in which the ſtatute ought to have been underſtood, and the explanation ſhall govern the operation of the ſtatute explained from the time of it's having paſſed into a law; ſo a child born in France in the year 1714 of an Engliſh mother, whoſe huſband was a Frenchman, cannot claim to be a natural born ſubject of Great Britain under the 7th of Ann, although the explanation of the ſtatute was made ſixteen years after his birth: not that the right was veſted in ſuch child, and afterwards taken out

of

of him by an *ex poſt facto* law ; but the ſole effect of the explanation is to declare, that the right never did accrue under the 7th of Queen Ann. The 4th of George the 2d, ceaſes to be explanatory, if it produces any effect, which cannot by conſtruction be given to the words of the 7th of Ann, in their true legal meaning or common acceptation. Be it then admitted, that the firſt clauſe of the 4th of George the 2d is explanatory, yet the ſecond clauſe is clearly of a different complexion : being in it's nature an excepting or reſtraining clauſe, which in fact becomes a new law.

The clauſe in the 7th of Queen Ann contains only four points, which are ſuſceptible of explanation : the 1ſt is, whether the benefit of the act ſhall depend upon the capacity of both or either of the parents ; and this has been explained : the 2d is, what parents are to be accounted natural born ſubjects themſelves ; the 3d is, what parts ſhall be deemed within or without

out the ligeance of the crown of Great Britain: and the 4th, what is the benefit conferred by the act The 1ſt of theſe four points is the only one, which the 4th of George 2d, undertakes to explain.

We have ſeen, that it is of the eſſence of an *explanatory* law, neither to extend or contract the effects of the explained law: for ſo, the explanatory ſtatute and the ſtatute explained would make two diſtinct laws: It is certain that the legiſlature may either enlarge or reſtrain any law, but it is more certain, that if they do it by act of parliament, ſuch act will not be an explanatory, but a new law: for the parliament cannot alter the nature and eſſence of things. It is therefore conſequently impoſſible, that parliament ſhould make an act *univerſally* beneficial, which contains an exception of ſeveral perſons indefinitely: it muſt in it's nature, be only *generally* beneficial, if it contains *any* exception of perſons. Now the word *all* without any exception

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tion annexed to it, is a term of univerſality; but the annexing of an exception, reduces it's nature from univerſal to general. The clauſe of the 7th of Ann is abſolutely univerſal; the 4th of George the 2d, if it hath any effect, is only general in it's operation: the two acts therefore differ eſſentially in their nature, and therefore one cannot be merely explanatory of the other. It can be no exception, if without it, the perſons excepted were not included in the univerſal term; thus if the parliament grant a benefit univerſally to all the natives of Ireland, it is no exception to exclude the natives of Jerſey from ſuch benefit, becauſe they were not included in the univerſal term: but it is an exception to ſay, that the benefit ſhall not extend to the natives of Dublin, becauſe they were included in the univerſal term: and it is as evident, that ſuch an exception cannot by poſſibility be an explanation of the univerſal term, ſince it effects the abſolute

change

change of it's nature: for the explanation of words ſhall neither dilate or contract their original meaning or effect. Upon the foregoing principles, there ariſes an abſolute impoſſibility, that an act of parliament ſhall be ſaid to be merely explanatory, which in order to produce any effect, aboliſhes the common law of the land, which was conſiſtent with the ſtatute explained: now as the two ſtatutes make but one in law, it is repugnant that the ſtatute explaining and the ſtatute explained ſhould verify two contrary propoſitions: but it is true and conſiſtent with the clauſe of the 7th of Ann, that the child of an Engliſhman attainted or of one ſerving an enemy is the child of a natural born liege ſubject by the common law: and if the 2d clauſe of the 4th of George the 2d, hath any effect, it is not true or conſiſtent with it, that the child of an attainted Engliſhman, or of one ſerving an enemy, is by common law the child of a natural born liege ſubject of England:

England: the truth of this is ſo obvious, that it will be frivolous to adduce proofs of it; for it is the very being a natural born ſubject, that conſtitutes the guilt of ſerving againſt that crown, to which the natural born liege ſubject owes his ligeance; and no man will be ſo extravagant as to ſay, that an attainder or ſuch foreign ſervice diſſolves or annuls the legitimacy of the iſſue of the party attainted.

It would be inſulting my readers, to add arguments to ſuch plain poſitions. It will not however be improper for their ſatisfaction, ſimply to recapitulate the wonderful meaning, ſenſe, extent, conditions, force, operation, and effects, which the parliament ſitting in the year 1708 actually did give, and annex to the before recited plain words of the 7th of Queen Ann: for if every thing expreſsly enacted by the 4th of George the 2d, was not actually contained in the 7th of Queen Ann, it ceaſes to be a mere explanation thereof. The generous legiſlators of that day

day gave credit to their poſterity for too comprehenſive underſtandings; the experience however of 23 years taught them in the year 1731, that the underſtandings of men were in that ſpace of time ſo hebetated, that they totally miſconceived the law made in 1708, and were abſolutely blinded to the extent of it's effects; it might not be difficult to ſay, what particular circumſtance in the year 1731, convinced the legiſlature of this rapid decline in the intellects of the nation, during the preceding 23 years. However ſuch it was: and in order to prevent future generations from running blindly into the ſame path of ignorance and ſtupidity, we are now all bound by act of parliament, to underſtand, know and believe, that when the legiſlature in the year 1708 made that ſimple clauſe of the 7th of Queen Ann and ratified and confirmed it again in the year 1711, that it not only intended and meant, but actually did, by force of the words it then uſed, ex-

cept out of it, the following deſcrip tions of perſons, viz. 1ſt the children of every father, who at the time of their birth was attainted of high treaſon, by judgment, outlawry, or otherwiſe, either in this kingdom or in Ireland. 2°, The children of every father, who at the time of their birth, was liable to the penalties of high treaſon or felony, in caſe of his returning into this kingdom or Ireland, without licence. 3°, The children of every father, who at the time of their birth, was in the actual ſervice of any foreign ſtate at enmity with Great Britain. But our underſtanding, knowledge, and belief by act of parliament, is not confined to this; for the legiſlature in the year 1708, further declared and enacted by the words of the clauſe of the 7th of Queen Ann, that theſe very exceptions were all to depend upon certain acts, or circumſtances of the perſons excepted: for it was at the option or in the power of any excepted perſon, to defeat the exception

ception in his own regard, 1° by living two years in England, and profeſſing the proteſtant religion, 2° by dying a proteſtant in this country. 3° By being in the receipt of the rents of any lands, tenements, or hereditaments in Great Britain or Ireland for the ſpace of one year: 4° by ſelling, conveying or ſettling for a valuable conſideration and *bona fide*, any lands tenements, or hereditaments, in Great Britain or Ireland, ſo that the perſon claiming under ſuch ſale conveyance or ſettlement, ſhould be for ſix months in the actual poſſeſſion or receipt of the rents and profits thereof. But the moſt ſingular part of the whole is, that the legiſlature in 1708, which intended and did actually make the exceptions, as well as it gave the power of defeating them, ſhould have made the exceptions to be perpetual, and confined the conditions or powers of defeating them to the ſpace of 23 years. It will be proper to conſider the particular nature of each of theſe powers: as to the

firſt: it was extraordinary, to annex a benefit to the profeſſion of the proteſtant religion for two years, and not require the continuance of the condition, whilſt the benefit ſhould laſt: as to the 2d it could evidently be only intended for the benefit of his poſterity; and they were at that time enabled by the 11th and 12th of William to derive their title through their alien anceſtors. As to the 3d, the law could have caſt the deſcent of no lands upon him (being an alien), of which he might receive the rents and profits: and as to the 4th, what purchaſer could be found ſo ſimple, as to give a valuable conſideration for lands which the grantor never could have taken by act of law, and conſequently could never have a right to grant? As the ſpace of 23 years, during which, the defeating powers were to laſt, hath been long ſince determined, no perſon born ſince the year 1731, can be otherwiſe affected by them, than in claiming or deriving a title

title to lands, as heir or a purchaſer, unto or through the perſon benefited by any of them.

Far be from me the idea, that the legiſlature cannot enact a law, by which the extent, operation, and effect of the 7th of Queen Ann ſhall be governed by the ſenſe of the 4th of George the 2d: but ſuch a law muſt eſſentially be a new law; for it far exceeds the nature of an explaining law, as, it is hoped, hath been clearly proved. From what hath heretofore appeared, it follows neceſſarily, that the perſons excepted out of the 4th of George 2d, either were included in the univerſal words of the 7th of Queen Ann, or they were not: if they were included, then the exception of them by a ſubſequent ſtatute, cannot in it's nature be an explanation of the general or rather univerſal term contained in the 7th of Queen Ann: and therefore this laſt ſtatute, if affected at all by the 2d clauſe of the 4th of George the 2d, was thereby reſtrained in the univerſality of it's operation;

and

and this could only be done by a new law: if they were not included in the univerſal term, it was nugatory in the legiſlature to attempt to except them out of it: and then the operation of the common law muſt decide this point, whether the child of an attainted father, was and is admiſſible to every benefit which the legiſlature or the common law holds out to all ſubjects of this country indiſcriminately: in other words, whether ſuch a child was a ſubject of this country.

We will conclude this conſideration by an appeal to the underſtanding of every individual, and of the legiſlature in general, whether in the uſe of the word *all*, ſeveral ſpecial and particular exceptions ſhall be intended or implied, when the term is not actually qualified by any expreſs exception being annexed unto it.*

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* Co. Lit. 147. If they will be ſatisfied with the anſwer of my lord Coke, the argument muſt be concluſive. *Ubi nulla eſt ambiguitas in verbis, ibi nulla expoſitio contra verba expreſſa fienda eſt.*

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The ſecond clauſe then of the 4th of George the 2d, if it hath any effect at all, is to all intents, conſtructions, and purpoſes whatſoever, a new law, viz. a ſtatute reſtraining the 7th and 10th of Queen Ann: and if, being a new law it acteth retroſpectively from the paſſing of the act which it reſtrains, according to the words *did*, *doth*, *or ſhall extend:* then will it be the firſt precedent of a diſabling and reſtrictive *ex poſt facto* law, which ever diſgraced the code of any municipal laws, much leſs thoſe of a free people. Every Engliſhman is free to ſay, that this arbitrary and deſpotic ſyſtem of enacting *ex poſt facto* laws, is abſolutely incompatible with the rights and liberties of Magna Charta, and conſequently unconſtitutional: the internal conviction of every man demonſtrates that the law of civilized nature ſecures to him in the loſs or injury of his property and perſon, ſome redreſs or relief. The man who is aggrieved by the retroſpective operation

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of an *ex poſt facto* law, may loſe his property, his rights and his liberties, which the law hath actually veſted in him, and be thereby excluded from every poſſible redreſs, without having had either the phyſical or moral power of preventing his loſs, injury, or diſability. It is evident, that if the 2d clauſe of the 4th of George the 2d hath any effect, it is that of an *ex poſt facto* law, which in reality muſt affect every perſon born before the year 1731, in themſelves and poſterity for ever. Mr. Lock's words, *eſtabliſhed and promulgated laws*, ſhall certainly not include an *ex poſt facto* law: for that can neither have any prior eſtabliſhment, or have received a promulgation. The court hath once determined, *that a ſtatute againſt common right and reaſon, is of itſelf void*, as we have ſeen. Be it to the legiſlature and judges of this country, to determine if an *ex poſt facto* law, be of this deſcription.

Too deplorable to be deſcribed, would be the condition of perſons ſuffering

fering the loſs of every thing dear and valuable to themſelves and families, under an *ex poſt facto* law, if any ſuch law had effect in this country: for altho' an attempt was made, and the intention of the legiſlature evidently was, to give this effect to that ſtatute of George 2d, yet a bleſſed fatality effectually intervened in the paſſing of this act, in behalf of the liberty of the ſubject, and the rights of the laws and conſtitution.

It hath before been ſaid, "*When an "act of parliament is againſt common "right and reaſon, or repugnant or impoſ-"ſible, the common law will controul it, "and adjudge ſuch act to be void.*"

I do not find any period of time, during which this doctrine has been overuled or contradicted. Several years after the determination of Dr. Boneham's caſe, the Lord Chancellor Hatton lays down the ſame doctrine* in as poſitive terms, as if

* Treatiſe concerning ſtatutes and acts of parliament, and the expoſition thereof, 18.

it were a poſtulatum. "If the mind and "words of the law be clean contrary, that "law or ſtatute is void, *ubi manifeſte pug* "*nant legis voluntas & verba, neutrum* "*ſequendum eſt. Verba, quia non con-* "*gruunt menti, mens, quia non congruit* "*verbis.*" What more clear than that the mind of the law was, that the children of attainted parents born abroad ſhould be excepted out of the 7th of Ann, and the 4th of George 2d; and therefore ſhould become or remain aliens? what more clear than the words, that ſuch children ſhould remain in the ſame ſtate, plight, and condition, to all intents, conſtructions, and purpoſes whatſoever, as if the act, which expreſſes the mind of the law, had never been made? And the ſame learned Chancellor continues, "Out of the premiſes ariſeth the ſolu- "tion of one great doubt; which is, "whether the parliament may err or "not: for it is lately declared, where- "in it hath erred. And though there "be no court higher, to convince or "pronounce upon the error, yet when "the

" the matter is plain, every judge may " eſteem of it, as it is, and being void, " is not bound to allow it for good and " forcible." And elſewhere he further ſays, " I agree that thoſe ſtatutes, " which are grievouſly penal, and thoſe " that derogate from the common law, " and thoſe that ſave not in their gene- " ral diſpoſition, perſons commonly in " all law favored, as infants, femes co- " verts, men beyond ſeas, men in ſer- " vice of their prince, ſuch as are im- " priſoned, ſuch as are of non ſane me- " mory, muſt be ſtrictly taken." And of ſuch tendency, it muſt be allowed, is the 4th of George 2d, particularly as to infants.

It hath been, it is preſumed, fully proved, that the 4th of George the 2d was a new law as to it's 2d clauſe; and conſequently was an *ex poſt facto* law: whether ſuch a law be or be not againſt *common right and reaſon*, is for others to decide. As the 2d clauſe of the 4th of king George the 2d, is eſſentially of a different nature from the firſt

clauſe of the ſame act, it is very poſſible, that one of them ſhall be good and valid, whilſt the other ſhall be null and void.

Every repugnancy or impoſſibility of an act of parliament, or of a clauſe, or of a ſentence in an act of parliament, muſt carry it's own evidence upon the face of it. If it do not carry with it this ſelf evidence, it will be vain and idle to apply facts, proofs, or arguments to eſtabliſh it. The naked expoſition of the repugnancy or impoſſibility muſt carry it's own conviction. Be it then attended to, that this clauſe enumerates certain deſcriptions of perſons to whom it ſays, that the benefit of the 7th and 10th of Queen Ann, did not and ſhall not extend : " *but that all ſuch children* " *are, were, and ſhall be, and remain in* " *the ſame ſtate, plight, and condition, to* " *all intents, conſtructions, and purpoſes* " *whatſoever, as they would have been in,* " *if the ſaid act of the 7th year of her* " *ſaid late Majeſty's reign, or this pre-* " *preſent act had never been made.*"

It

It hath, I truſt, been ſufficiently proved, that the ſecond clauſe of the 4th of George 2d, is not an explanation of the 7th of Queen Ann: but altho' it ſhould be ſo allowed, it will work no difference or obſtacle to the preſent purpoſe, of ſhewing the repugnancy and impoſſibility of the clauſe: it will in the one caſe be conſidered as an original exception in the 7th of Queen Ann, and in the other, a reſtraing clauſe in the 4th of George the 2d. It muſt then be allowed, that if the perſons deſcribed in this clauſe of the 4th of Geo. 2d, are in any manner affected, it muſt be by the exception or by the reſtriction: if they are in no manner affected by it, then they ſtand preciſely, as if this particular clauſe had never been made, and conſequently neither excepted out of the benefit of the 7th of Ann, or reſtrained by the 4th of George the 2d, from claiming their right under it. One of the two alternatives muſt be admitted; either they are affected by the clauſe, or they are not: the admiſſion

of

of either of theſe alternatives, demonſtrates the repugnancy of the clauſe: if they are affected by it, then it is repugnant and impoſſible, that they ſhould be in the ſame ſtate, plight, and condition, to all intents, conſtructions, and purpoſes whatſoever, as they would have been in, if the very act which contains the clauſe that affects them, had not been made: for they then would evidently not have been ſo affected; and ſo the ſame clauſe, which enacts that they ſhall be affected, counteracts it's operation, by enacting that they ſhall not be affected; which is moſt glaringly repugnant and impoſſible. If they are *not* affected by it; then is it repugnant and impoſſible for the legiſlature to prevent the effects of the 7th and 10th of Ann, from extending to them, by a clauſe which does not *affect* them.

A perſon under a diſability, is manifeſtly not in the ſame ſtate, plight and condition, in which he was before he incurred the diſability: now, before the 7th

7th of Queen Ann, the ſon of an attainted Engliſhman, laboured under no diſability, which the ſon of an Engliſhman not attainted, did not alſo labour under. And the 4th of George the 2d, (whether by exception or reſtriction it matters not) impoſes a diſability upon the child of an attainted father, to claim a benefit, which, had his father not been attainted, he could have eſtabliſhed an undoubted right unto: And this muſt eſſentially alter his ſtate, plight, and condition from what it was before: it is therefore an abſolute repugnancy to do that, which alters the condition of a man, and leave him in the ſame ſtate, in which he was before his condition was altered.

I am at a loſs to place this repugnancy and impoſſibility in a clearer point of view than I already have. It may tend to diſcloſe this matter with greater perſpicuity, if we conſider how the clauſe might have been framed without the repugnancy. If it had been enacted by the clauſe, that nothing in the 7th and

10th of Ann, had extended or ſhould extend to intitle the perſons deſcribed therein to the benefit intended by thoſe acts, without ſaying any more: then indeed the clauſe would have retained the hardſhip of *an ex poſt facto* law, but would not have been repugnant or contradictory to itſelf.

The laſt words of the clauſe, which ſay that all children of attainted fathers, &c. born abroad, *ſhall be in the ſame ſtate, plight, and condition, to all intents, conſtructions, and purpoſes whatſoever, as they would have been in, if the ſaid acts of the 7th and 10th of Ann, and this preſent act had not been made*; are eſſentially of ſuch a repugnant quality, that muſt neceſſarily have defeated whatever had been enacted concerning the children of attainted parents born abroad, beneficial or prejudicial to them. For words cannot more emphatically expreſs, that no child of an attainted father born abroad, ſhall even by poſſibility be affected with any thing contained in the 4th of George the 2d; if

if the very mentioning of them therefore can affect them, it is repugnant to do it: for they cannot be in any manner affected by the act, but their ſtate, plight, and condition, ſhall be altered to ſome intent, conſtruction, purpoſe, or other; and then cannot they remain in the ſame ſtate, plight, and condition, to all intents, conſtructions, and purpoſes whatſoever, as if the act had not been made. To give any effect to the firſt part of this clauſe, the child of an attainted father born abroad, muſt be in ſome manner affected by it; to give any effect to the latter part of the clauſe, ſuch child muſt in no manner be affected by it. Theſe contrary effects cannot by poſſibility be produced in the ſame child; therefore the whole clauſe is in itſelf repugnant and contradictory, and therefore null and void, as if it never had exiſted; for here *manifeſtè pugnant legis voluntas & verba.*

How then would the children of the perſons excepted in the clauſe of the 4th of George 2d, be intitled to claim their rights of Engliſhmen, if this clauſe were ſtrucken out of the 4th of George 2d? they would be as fully intitled to the benefit of the 25th of Edward 3d, and the 7th and 10th of Queen Ann, and of the 1ſt clauſe of the 4th of George 2d, as any other children of natural born ſubjects of England, under ſimilar circumſtances. For neither the common or ſtatute law of this realm, has ever annexed any diſability whatever to the child of an attainted father, which was not common to the child of a father not attainted. And although here we ſpeak of the child of an attainted father born abroad, yet we ſpeak alſo of other children under the ſame circumſtance; ſo that comparing them under one particular circumſtance, which is common to both, is comparing them generally.

That

That inveſtigation muſt be defective, which omits to ſay any thing, that can really throw light and perſpicuity upon the ſubject of inveſtigation. About the year 1731, it was well known, that many natural born ſubjects of this country, who adhered to the cauſe of the abdicated family of Stuart, were reſident abroad, as appears from an edict of the French king * for obliging them to take up arms: "His Majeſty being "informed that there is a conſiderable "number of Engliſh, Scotch, and Iriſh, "in his good city of Paris, and ſpread "over the other towns and provinces, "of his kingdom, &c." Let us then ſuppoſe, (no matter how improbably) that the legiſlature in 1731, had it only in view and intention, to diſable the children born abroad of ſuch adherents to the houſe of Stuart, from claiming the rights of natural born ſubjects, and of courſe from taking the

* Detection of parliament of England, 2 vol. 499.

eſtates

eſtates of their anceſtors either by deſcent or purchaſe. Let us further ſuppoſe, that a poor Scotch Highlander born abroad of ſuch parents, who were intended to be diſabled by the act, had after it's paſſing, returned to his own country, to take poſſeſſion of the family cottage, after the death of his father: and that this he found ſeized upon by his younger brother, who had been born in Great Britain: we will further ſuppoſe this difference between the two brothers, to have been ſettled and adjuſted on the ſpot by themſelves and neighbours; their reaſons and arguments were unaſſiſted by art, though guided by that good ſenſe and judgment, which falls generally to the ſhare of the inhabitants of that country.

The elder brother aſſerts, that although he was born abroad, yet his father was a natural born ſubject of Great Britain, at the time of his birth: that the legiſlature had paſſed ſeveral acts of parliament to place ſuch ſons in the

the ſame ſtate and condition, as if they had been born in Great Britain: and that conſequently he had a right to his inheritance.

The younger brother replies, that by the laſt act of parliament paſſed upon that ſubject, his elder brother was particularly excepted and excluded from claiming the benefit of the acts of Queen Ann: and that he conſequently became an alien; by which means he acquired the right of inheriting the cottage, of which he ſhould maintain his poſſeſſion.

Brother, ſays the elder, before this act of George the 2d had paſſed, you and I differed not in our blood: one father begat us, one mother bore us; ſhe was delivered of me, ſoon after ſhe had landed on the continent, whither ſhe went to attend upon our honoured father: ſhe was delivered of you, immediately upon her return hither to take care of this very cottage, and her infant family: our father at the time of each of our births, undoubtedly

undoubtedly received pay from the French King; neither you or I have taken up arms, or committed any offence againſt the government of Great Britain: and the ſole difference which was between us before this act of George the 2d, was the place of our birth; but at the time of my birth, this was removed by the 7th of Queen Ann, and I therefore had then in me, as ample a capacity to inherit this cottage, or any other land, as you now have. And when you tell me, that this act of King George, takes away the right from me, and then the law veſts it in you: I anſwer, this cannot be; for it is impoſſible that an act of parliament ſhould defeat my inheritance, which particularly enacts, that nothing contained in it ſhall extend to affect me in any manner whatever.

The good ſenſe of the younger brother and of all the neighbours, admitted the impoſſibility and repugnancy, of the elder brother's being diſinherited by a ſtatute, which expreſsly enacts

that

that he ſhall after it's paſſing, be and remain in the ſame ſtate, plight, and condition, in which he was before it paſſed. And the poſſeſſion was accordingly delivered up to the elder.

The laſt act, which I find in our ſtatute books, relative to this ſubject, was made ſo lately as in the 13th year of his preſent Majeſty. It is to be preſumed, that ſome particular end and purpoſe was propoſed by it: but after the conſideration, which has been given to the foregoing naturalizing acts, it muſt certainly be allowed to operate no effect, which was not before produced by the naturalizing acts of Queen Ann, and King George the 2d. It recites, that, "Whereas divers natural born "ſubjects of Great Britain, who pro-"feſs and exerciſe the proteſtant reli-"ligion, through various lawful cauſes, "eſpecially for the better carrying on "of commerce, have been and are obli-"ged to reſide in ſeveral trading cities, "and other foreign places, where they "have contracted marriages, and

"brought

" brought up families. And whereas " it is equally juſt and expedient, that " the kingdom ſhould not be deprived " of ſuch ſubjects, nor loſe the benefit " of the wealth, that they have ac- " quired ; and therefore that not only " the children of ſuch natural born " ſubjects, but their children alſo, " ſhould continue under the allegiance " of his Majeſty ; and be intitled to " come into this kingdom, and to bring " hither and realize, or otherwiſe em- " ploy their capital: but no proviſion " hath hitherto been made to extend " farther, than to the children born out " of the ligeance of his Majeſty, whoſe " fathers were natural born ſubjects of " the crown of England, or of Great " Britain." And then enacts, " That " all perſons born, or who after ſhall " be born out of the ligeance of the " crown of England, or of Great Bri- " tain, whoſe fathers were or ſhall be, " by virtue of the aforeſaid ſtatute of " King George the 2d, intitled to all " the rights and privileges of natural

" born

" born ſubjects of the crown of Eng-
" land, or of Great Britain, ſhall and
" may be adjudged, and taken to be,
" and are hereby declared and enacted
" to be natural born ſubjects of the
" crown of Great Britain, to all in-
" tents, conſtructions, and purpoſes
" whatſoever, as if he and they had
" been and were born in this king-
" dom."

It is evident from this preamble, that the ſtatutes of the 7th of Ann and 4th of George the 2d, are beneficial both to the parties claiming under them, and to the crown; and therefore are to be conſtrued largely and equitably: now it appears as clear as a firſt principle, that a perſon born abroad whoſe father and mother were natural born ſubjects of Great Britain, may claim the benefit of the 7th and 10th of Ann, and the 4th of George 2d: and it is equally clear, that a perſon may be a natural born ſubject of Great Britain by ſtatute law, as well as by com-

mon law. By what ſort of conſtruction then, ſhall theſe beneficial ſtatutes be made to extend their benefit to the children born abroad of parents, who were *natural born ſubjects* by the common law, and withold it from ſuch children, whoſe parents were *natural born ſubjects* by the ſtatute law? The admiſſion of ſuch a conſtruction, would eſſentially annul the effects of every naturalizing ſtatute: for the very eſſence of ſuch acts is, to make the perſons benefited by them, natural born ſubjects of this kingdom, to all intents, conſtructions, and purpoſes whatſoever, as if they had been actually born within the ligeance of our king; and it is ſelf-evident, that they cannot be ſo, if their children remain incapable of inheriting their eſtates, in thoſe caſes, in which the children of perſons born within the ligeance of our king, are capable of taking their father's inheritance. Nay even the very ſtricteſt conſtruction of the 7th of Queen Anne, ſhall

ſhall never go to exclude the children, whoſe fathers and mothers were natural born ſubjects by ſtatute, unleſs it eſtabliſhes this doctrine, that a perſon, who was not a natural born ſubject by the common law, cannot be made ſuch by the ſtatute law; and this would defeat the very eſſence and effect of the 7th of Queen Ann. It follows then, that by no conſtruction whatſoever, can it be ſaid in truth, that the effects of the 7th and 10th of Ann, and the 4th of George 2d, are confined to the children born abroad of parents, who were themſelves born within the ligeance of our king: and not alſo to the children of ſuch children. It is not the purpoſe of this inveſtigation, to defend and juſtify the abſurd or inconvenient conſequences, which may flow from the law as it now ſtands, but only to diſcloſe what thoſe conſequences really are: and this has in part been done in the foregoing ſheets

When therefore it is ſaid in this preamble, *that no proviſion hath hitherto*

been made to extend farther than to the children born out of the ligeance of his Majeſty, whoſe fathers were natural born ſubjects of the crown of England, or of Great Britain: the real conſequence that flows from theſe words, is not, as the enacting part of the ſtatute ſuppoſes, therefore no proviſion is made for the children, whoſe parents are *natural born ſubjects by ſtatute;* but therefore no proviſion is made for the children, whoſe *fathers were not, or whoſe mothers only* were natural born ſubjects. And from what has been before ſaid upon this ſubject, it is concluſively evident, that the only doubt, which aroſe upon the clauſe of Queen Ann, was, whether ſuch right of being a natural born ſubject, ſhould accrue to a child born abroad, through his mother, as well as through his father: and the 4th of George 2d ſolves this doubt, by confining the benefit to the children, whoſe *fathers* were or ſhall be natural born ſubjects.

But

But this ſtatute of his preſent Majeſty, does not confine itſelf to extend the proviſion of the 4th of George the 2d, to the children of ſuch children born abroad, whoſe fathers were natural born ſubjects; which certainly was unneceſſary; but it introduces a new penal law againſt the Roman Catholics of this kingdom, by ſubjecting them to a diſability, which was before unknown to them: for certainly before this act, the child of a Roman Catholic father was as clearly intitled to be a natural born ſubject, under the 7th of Ann, and the 4th of George the 2d, as the child of a father of any other perſuaſion: the Roman Catholics are not excepted out of either of the acts of Ann, or of George the 2d; nor is the conformity with the eſtabliſhed religion by either of them, made the requiſite condition, to entitle a perſon to their benefit. Whoever gives himſelf the trouble to throw his eye upon the very many and heavy penal ſtatutes ſtill in force againſt the Roman Catholics of

this

this country, will certainly not incline, in this age of general toleration, to add to their number or ſeverity.

There are ſome other means of acquiring the rights of naturalization in this country, beſides thoſe of a private act of parliament, which it will be proper to mention, before we conclude this inveſtigation; * as, by ſerving two years on board Britiſh ſhips, upon proclamation in time of war: † by reſiding ſeven years in the Britiſh Colonies in America; ‡ by ſerving three years in the whale fiſhery: ‖ and by ſerving his Majeſty two years in America.

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* 13. Geo. c. 3.
† 13. Geo. 2. 7.
‡ 22. Geo. 2. c. 45.
‖ 2. Geo. 3. c. 25.

APPEN-

APPENDIX.

SINCE the above ſheets were written, the author has received the conſent of the noble family, which is moſt deeply concerned in the points of law, which have been the ſubject of his inveſtigation, to publiſh and apply their caſe to the doctrine already laid down. There may be ſome deſcriptions of men, who think all reaſoning upon a legal ſubject, to be artificial, and the inferences deduced therefrom to be no more than a fiction of certitude. Upon theſe perſons, the application of a living example, may act as a priſm, to analize and diſſolve the mixt aſſemblage of colouring, under which the object was repreſented to them, into their true original and primæval colours.

It may not be improper to preface this caſe with ſome few poſitions and principles, laid down by the learned

author

author of the conſiderations on the law of forfeiture. * " Corruption of " blood, ſays he, goes only to eſtates " *deſcending* in the courſe of inheri- " tance. *Nothing the heir takes by* " *purchaſe is affected by it.* He is " capable under a teſtamentary deviſe, " or family ſettlement, or legal grant " of any kind to himſelf." † In another place, he ſays, " It were better " to have no law nor penalties to en- " force law, nor the very form of " civil government, than to receive " only an enſnaring protection from " it," and elſewhere " The ſaying " is, and it deſerves to be engraven on " the hearts of judges, *that it is better* " *ten guilty men ſhould eſcape, than one* " *innocent ſuffer.*

In the year 1691 by indentures of leaſe and releaſe ſeveral manors, lands, and hereditaments, in the counties of

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* Conſiderations on the law of forfeiture, p. 89.

† Ibidem 130.

Northum-

Northumberland, and Cumberland, were ſettled, limited, and aſſured, to Francis Earl of Derwentwater, for life, and after his death and ſubject to a truſt for raiſing 5000l for his daughter, and to ſeveral annuities payable to his four younger ſons for their reſpective lives, to the uſe of Edward Lord Viſcount Radcliffe and Langley, (the eldeſt ſon of the ſaid Francis Earl of Derwentwater,) for life, with remainders ſucceſſively to James Radcliffe, and Francis Radcliffe, the only two ſons of the ſaid Viſcount then in being, in ſtrict ſettlement, and to his 3d, 4th, 5th and other ſons in tail male: with remainders ſucceſſively to the four younger ſons of the ſaid Francis Earl of Derwentwater in ſtrict ſettlement: remainder to the ſaid Francis Earl of Derwentwater in tail general: remainder to his right heirs for ever.

Upon the death of the ſaid Francis Earl of Derwentwater, the ſaid Edward, his eldeſt ſon and heir, became Earl of Derwentwater: and the ſaid Edward

Earl of Derwentwater upon his death, was ſucceeded in title and eſtates by his eldeſt ſon the ſaid James, late Earl of Derwentwater: who *then* became tenant for life of the aforeſaid ſettled eſtates with remainder to his 1ſt and other ſons in tail male.

In the year 1712, by leaſe and releaſe, in conſideration of the marriage of the ſaid James Earl of Derwentwater with Miſs Webb, ſeveral manors, lands, and hereditaments, in the counties of Northumberland, Cumberland, and Durham, were ſettled to take effect after the ſolemnization of the marriage, ſubject to a term of 99 years limited in part of the premiſes, which is ſince determined, to the uſe of the ſaid James Earl of Derwentwater for his life, remainder and ſubject to the jointure of his wife, and to a term of 200 years (ſince determined) to the uſe of the 1ſt, 2d, 3d and other ſons of the ſaid James Earl of Derwentwater by that marriage, ſucceſſively in tail

tail male; remainder to truſtees for 500 years, for raiſing portions for a daughter or daughters of the ſaid marriage, in default of iſſue male of the marriage: remainder to the uſe of the ſaid James Earl of Derwentwater in tail male: remainder to the ſaid Francis Radcliffe 2d brother of the ſaid James Earl of Derwentwater for life; remainder to his 1ſt and other ſons in tail male: remainder to Charles Radcliffe the 3d brother of the ſaid James Earl of Derwentwater for life, remainder to his 1ſt and other ſons ſucceſſively in tail male: with proper limitations to truſtees, to preſerve contingent remainders during the lives of each tenant for life: with the ultimate remainder to the ſaid James Earl of Derwentwater in fee.

The aforeſaid Edward Earl of Derwentwater left three ſons, viz. James, Francis and Charles: and the brothers of the aforeſaid Francis Earl of Derwentwater, all died without iſſue. Between the 24th of June, 1715, and the

the 24th of June, 1718, the ſaid James Earl of Derwentwater, and his brother Charles Radcliffe, were attainted of high treaſon: the former was ſoon after executed, and the latter fled out of the kingdom. Francis Radcliffe, the 2d brother of the ſaid James, died an infant without iſſue: the ſaid James late Earl of Derwentwater left one ſon, named John, and one daughter, named Anna Maria.

By the 1ſt of George the 1ſt c 50 it was enacted, that all the lands, hereditaments, rents, reverſions, ſervices, remainders, poſſeſſions, &c. whereunto any perſon or perſons attainted, between the 24th days of June, in the years 1715 and 1718, for high treaſon committed before the 21ſt day of June in the year 1716, were intitled, were declared to be forfeited to, and were thereby veſted in his then Majeſty, his heirs and ſucceſſors, for the uſe of the public, *according to the ſeveral and reſpective eſtates*

eſtates and intereſts, which ſuch attainted perſons had therein; and where any of the perſon or perſons attainted or to be attainted, within ſuch days and times as aforeſaid, were ſeized of an eſtate tail *in poſſeſſion,* in any ſuch hereditaments, or premiſes, the ſame was enacted and declared to be veſted in his Majeſty, his heirs and ſucceſſors, in fee ſimple; to the end, the ſame might be abſolutely ſold, diſpoſed or applied, according to ſuch acts of parliament, as ſhould thereafter be made in that behalf. And by the ſame act, as alſo by the 3d of George 1ſt, all perſons (except ſuch forfeiting perſons, their repreſentatives, or truſtees, and perſons claiming an eſtate in remainder or reverſion, expectant upon the determination of any eſtate tail of which *a forfeiting perſon* was ſeized in poſſeſſion,) having any right, title, intereſt, &c. in law or equity, in, to, out, of, or upon the ſaid hereditaments and premiſes, were directed to make their claims before certain

tain commiſſioners thereby appointed, in manner therein mentioned, otherwiſe the ſaid rights and intereſts to be null and void.

It appears manifeſt, that nothing was forfeited to the crown, but the rights and intereſt of the forfeiting perſons, (except in the caſes of tenants in tail in poſſeſſion) : and the enacting, that perſons *having* any eſtate or intereſt &c. ſhould enter their claims, preſumes that the perſons ſo directed to enter their claims, muſt be in *eſſe*, becauſe they are directed to do an act, and are puniſhed for their neglect by the forfeiture of their rights, in default of ſuch claim made : and that theſe acts could extend only to make null and void, the eſtates of ſuch perſons, as then had eſtates in them, and could claim them, but omitted ſo to do; and not to make void the contingent eſtates of perſons unborn, in whoſe behalf, the acts have omitted to appoint any perſon to claim : as was provided in the caſe of infants, femes covert,

covert, idiots and lunatics. So that the caſe of contingent remainders, was omitted out of the act, and ſuch eſtates were neither forfeited to the crown by the forfeiting acts, (which veſt in the crown nothing more than the rights and intereſts of the forfeiting perſons, except in the caſes of tenants in tail in poſſeſſion) nor were they declared to become null and void, for want of a claim.*

The eſtates, rights, and intereſts, which were veſted in the late James Earl of Derwentwater, at the time of his attainder, and which were thereby forfeited to the crown, were, 1° an eſtate for life in poſſeſſion in all the premiſes comprized in the two ſettle-

* The following eminent lawyers were unanimous in this opinion, viz. Mr. Lutwyche in an opinion written February 24, 1731. Mr. Pigott, November 1, 1732. Mr. Fazakerley, 14th of January, 1747. Mr. Filmer, January 23, 1747. Mr. Wilbraham, May 21, 1748.

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ments of 1691 and 1712. 2° an eſtate in tail male in remainder, expectant upon the default of iſſue male of his marriage with Miſs Webb, in the premiſes comprized in the ſettlement of 1712. And 3° the reverſion in fee of both the eſtates, expectant upon the determination of all the limitations reſpectively contained in the two ſettlements of 1691 and 1712. The eſtates, rights, and intereſts, which were veſted in the ſaid Charles Radcliffe, at the time of his attainder, and were thereby forfeited to the crown, were 1° an eſtate for life in remainder, expectant upon the default of iſſue male of the body of his elder brother James to be begotten, in all the premiſes comprized in the ſettlement of 1712. And 2° an eſtate in tail male in remainder, expectant upon the ſaid laſt mentioned contingency, in all the eſtates comprized in the ſettlement of 1691.

By an act of the 4th of George 1ſt, all the aforeſaid hereditaments and premiſes were veſted in certain truſtees

according

according to the eſtates and intereſts there-in veſted in his Majeſty, that they might be ſold, &c. and all perſons *having* right, &c. were again directed to make their claim, before the commiſſioners thereby appointed, otherwiſe their rights to be null and void. Mr. John Radcliffe, the infant ſon of James late Earl of Derwentwater, exhibited by his mother and guardian before the commiſſioners, two ſeveral claims, by one of which, he claimed the premiſes comprized in the ſettlement of 1691, and by the other, the premiſes comprized in the ſettlement of 1712, as the right of the claimant, and the heirs male of his body: the firſt of theſe claims was allowed, the latter diſmiſſed by the ſaid commiſſioners; but the latter decree was, upon an appeal to the court of delegates, reverſed; and Mr. John Radcliffe in conſequence thereof, entered into poſſeſſion of all the premiſes comprized in the ſaid two laſt mentioned ſettlements, as tenant in tail male.

By the 9th of George 1. c. 19. it was enacted, that the forfeited eſtates which ſhould remain unſold after the 29th of September 1723, were thereby diveſted out of the ſaid commiſſioners and truſtees, and veſted in his Majeſty, his heirs and ſucceſſors, for the uſe of the public.

On the 28th day of September, 1723, a deed of ſale was executed by the commiſſioners to William Smith, of the aforeſaid forfeited eſtates, according to the rights and intereſts therein, then veſted in his Majeſty, his heirs and ſucceſſors, by virtue of the attainders of the ſaid James late Earl of Derwentwater, and Charles Radcliffe, or in the ſaid commiſſioners and truſtees, by virtue of the aforeſaid act of the 4th of George the 1ſt.

All the eſtates comprized in both the ſettlements of 1691 and 1712, being now veſted in Mr. John Radcliffe, in tail male, nothing more was done by the legiſlature, whilſt he lived, concerning them. In the year 1724, Mr. Charles

Charles Radcliffe intermarried with the Counteſs of Newburgh, by whom he had two ſons and ſeveral daughters, born in France: the preſent Earl of Newburgh was the eldeſt child of that marriage, and was born on the 25th. day of Auguſt, in the year 1725.

Some time in or about the year of our lord 1731, Mr. John Radcliffe died unmarried, and under age: and in the ſame year was paſſed the 4th of George the 2d, of which we have ſpoken ſo amply in the foregoing ſheets. Upon the death of Mr. John Radcliffe without iſſue male of his body begotten, an eſtate in tail in poſſeſſion, veſted in Charles Radcliffe, in the eſtates comprized in the ſettlement of 1691; and became veſted in his Majeſty, (or in the purchaſer William Smith) in fee ſimple, by virtue of the forfeiting act of the 1ſt of George 1ſt; and alſo his Majeſty, (or the purchaſer William Smith) became in the right of Mr. Charles Radcliffe, intitled to an eſtate for his life in poſſeſſion, in the premiſes

comprized in the ſettlement of 1712: and alſo to the reverſion in fee of both the eſtates, expectant upon the deceaſe of the ſaid Charles Radcliffe without iſſue male of his body begotten.

In caſe James Earl of Derwentwater had left iſſue male by another venter, it might have become a queſtion, whether the eſtate in tail male general, limited to him in remainder by the ſettlement of 1712, would upon the death of Mr. John Radcliffe, have veſted in the crown by force of the forfeiture, and have continued as long, as he ſhould continue to have iſſue male. But as the caſe happened, this eſtate in tail male general in remainder never came into poſſeſſion after the death of Mr. John Radcliffe, for want of iſſue male of the body of the ſaid James Earl of Derwentwater. The learned author of the conſiderations on the law of forfeiture,* expreſſes himſelf with great clarity and

* P. 85. 86.

preciſion

preciſion upon this ſubject: "There "remains a material difference to be "noted, between the caſe of a fee tail "and a fee ſimple; * which is, that "notwithſtanding the forfeiture of "lands entailed by an attainder, yet "the blood of the attainted perſon is "not corrupted, ſo as, by any conſe- "quential diſability, to affect the iſſue "in tail. Therefore, if the ſon of the "donee in tail be attainted of treaſon, "during the life of the father, and die, "having iſſue, and then the father "dies, the eſtate ſhall deſcend to the "grandchild, notwithſtanding the at- "tainder: but it is otherwiſe in the "caſe of a fee ſimple, as has been "ſhewn in the ſpeaking of the feudal "law. The reaſon is obvious, becauſe "the iſſue in tail claims *per formam* "*doni*; that is, he is as much within "the view and intention of the gift or "ſettlement, and as perſonally and

* 3 Co. Dowtie's caſe.

"preciſely

" precisely described in it as his an-
" cestor. But this is not all. The for-
" feiture of estates tail came in by
" the construction of the statute of
" the 28th of Henry the 8th. The
" judges resolved, that the general
" words of those statutes comprehended
" these estates. But then such laws be-
" ing of a penal kind, though they are
" to be construed so, as to attain their
" full effect, yet they are to be con-
" strued strictly; and, however they
" might extend to make estates tail li-
" able to forfeiture, where they are
" actually in the offender's possession,
" and consequently in his power to ali-
" enate, they could not, by any rule of
" construction, be extended to bring
" consequential disabilities on the heir,
" where the estates have not been in
" the offender's possession.

I need add nothing more to prove, that the estates comprized in the settlement of 1712, were not forfeited to his Majesty in fee simple, upon the death of Mr. John Radcliffe, than that

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an eſtate tail therein, never was in the offender's poſſeſſion.

Mr. Charles Radcliffe had at this time two ſons, who, though born in France, were, as we have ſeen, by ſtatute natural born ſubjects of England. It was as evident, that the eldeſt ſon of Mr. C. Radcliffe, could have no right to the eſtates comprized in the ſettlement of 1691, as that he ſhould not without forfeiting it himſelf, be excluded from taking an eſtate tail in remainder, expectant upon the death of his father, in the premiſes comprized in the ſettlement of 1712. So that the preſent Earl of Newburgh, being, as we truſt, has been fully proved a natural born ſubject of Great Btitain, notwithſtanding the attainder of his father and his own foreign birth, he, as well as his couſin german, Mr. John Radcliffe, *was capable of taking under a family ſettlement*.

Here then *patet atri janua ditis* : not contented with the fee ſimple of the eſtates comprized in the ſettlement of

of 1691, which became now legally veſted in the crown by the attainder of Mr. Charles Radcliffe, and alſo with his life intereſt in the eſtates comprized in the ſettlement of 1712 ; the parliament ſitting at that time, attempted to ſecure the default of iſſue male of the body of Mr. C. Radcliffe, although he had then two ſons living : by which means alone, they could alſo ſecure the reverſion in fee of the eſtates ſettled in the year 1712, which would become veſted in poſſeſſion upon his death without iſſue male. The expedient then for carrying this deſign into execution, was to unnaturalize the two ſons already born, and make them aliens : and that by an *ex poſt facto* reſtraining law, which if it hath any effect at all, is to preclude them from aſſerting their rights of natural born ſubjects under the 7th of Queen Ann. If this effect is to be produced by that act, then truly did the law give only an *enſnaring protection* to the Counteſs of Newburgh, who might with as much facility

facility have been delivered of her children on this, as on the other ſide of the water ; but the law expreſsly told her, that the place of the birth of the child was immaterial, provided the child's parents were natural born ſubjects of Great Britain : ſuch ſhe knew herſelf to be, and if ſuch had not been her huſband, he could not have been guilty of the treaſon, for which he was attainted ; nor could the crown have acquired a right to the fee ſimple of the eſtates comprized in the ſettlement of 1691, or to his life eſtate in the premiſes ſettled in 1712, by the forfeiture, unleſs theſe eſtates had veſted in him ; and they could not have veſted in him, if he had not been a natural born ſubject of Great Britain; for ſuch right and intereſt only was forfeited to the crown, as was in the forfeiting perſons. This is one caſe indeed out of many hundreds, where the unconſtitutional grievance, of ſuffering under an *ex poſt facto* law, has reduced families to extreme indigence and miſery : and

if it may be permitted to judge from the aſſemblage and combination of all the circumſtances attending it, it was the chief, if not the only, ground for making the law. So abſurd, cruel and unconſtitutional is it, to frame general diſabling ſtatutes to the policy or exigencies of private caſes. † *Vetant leges ſacratæ, vetant duodecim tabulæ leges privatis hominibus irrogari.*

Little would it have availed the government, to ſecure theſe forfeited eſtates, from thoſe who, claimed them under family ſettlements, if William Smith the purchaſer was ſolely to be benefited by them: it is true, that he gave but a ſmall value for them, but then, it is alſo true, that the events which were to reduce the eſtates into poſſeſſion, were contingent and remote: Mr. John Radcliffe, then was in the eleventh year of his age, he might marry and have iſſue male before the age of twenty-one, and if he attained that age, a common recovery might have

† Cic.

defeated

defeated the poſſibility of the purchaſer's gaining any thing by his bargain: Mr Charles Radcliffe was alſo a young man, and might have children, who would exclude the purchaſer from the eſtates comprized in the ſettlement of 1712, after the death of their Father. However the ſale to William Smith, was after a parliamentary enquiry into the nature of it, declared to be null and void by the 5th of George 2d c. 23. The 8th and 11th of George the 2d, which direct the application of the rents of the ſaid eſtates, towards building and maintaining the royal hoſpital at Greenwich, always add the words, *for and during his Majeſty's eſtate and intereſt in the premiſes;* which manifeſtly ſhew, that the intereſt of the crown in the forfeited eſtates, was deemed by the legiſlature to be determinable upon ſome event or contingency, which could not be, if the fee ſimple thereof were veſted in his Majeſty.

The laſt act of parliament, which was paſſed upon this ſubject, was the 22d

of George 2d c. 52. In the year 1746, Mr. Charles Radcliffe was executed for the treaſon committed by him in the year 1715, upon the happening of which event, either the reverſion in fee became veſted in poſſeſſion in the crown, by virtue of the attainder, upon the death of Mr. Charles Radcliffe without iſſue male of his body begotten, or the eſtate in tail male became veſted in poſſeſſion in the Earl of Newburgh, in the premiſes comprized in the ſettlement of 1712, as the firſt ſon of the body of Mr. Charles Radcliffe begotten.

The 25th of Edward the 3d, the 7th and 10th of Queen Ann, and the 4th of George the 2d, are all of them public and general acts: and they cannot be confined or fruſtrated in their effects, by a ſubſequent act of parliament, which does not explain, reſtrain, or repeal the whole or any part of them: but which only recites in the preamble a preſumption, that five individuals are not admiſſible to the full benefit of them. This act therefore

leaving

leaving all the prior acts, which it recites, to their own operation, takes notice, that the preſent Earl of Newburgh, upon the death of the ſaid Charles Radcliffe, had actually claimed the poſſeſſion of the premiſes ſettled in 1712, as the intereſt of the crown therein had determined by the death of his father: but that the commiſſioners and governors of the ſaid hoſpital maintained their poſſeſſion, upon the ground of a want of claim, none having been put in on his behalf, within the time limited by the 1ſt and 4th of George the 1ſt: and that the ſaid Earl of Newburgh, was then abſolutely unable to bear the expence of litigating the points, whether ſuch claim was neceſſary on his behalf, and whether he was to be deemed an alien under the clauſe of the 4th of George the 2d: neither of which points the act undertakes to determine: and they are therefore ſtill open to diſcuſſion. The act further recites, that his Majeſty was graciouſly inclined, that ſome

relief

relief ſhould be granted to the ſaid Earl of Newburgh; ſo as the ſame ſhould be conſiſtent with the rights of Greenwich hoſpital; and that the fee and inheritance of all the aforeſaid eſtates might be abſolutely veſted in truſtees, for the uſe and benefit of the ſaid hoſpital for ever, free and diſcharged from all the right, title, claim and demand of the ſaid Earl of Newburgh, and of his Majeſty in his right, and of all others claiming by or under any of the limitations contained in the ſettlement of 1712: and it further recites, that the ſaid Earl of Newburgh was conſenting, that all the right, title, and intereſt, which he or his iſſue male, had or could have to the premiſes comprized in the ſettlement of 1712, ſhould be extinguiſhed by authority of parliament, and that the abſolute fee ſimple and inheritance of the ſaid premiſes ſhould be ſo veſted in the royal hoſpital at Greenwich, and their ſucceſſors for ever. And it is remarkable, that the act avoids determining

ing the point, whether the Earl of Newburgh and his brother were aliens: for in veſting the eſtates in the truſtees, it uſes theſe ambiguous words, freed and abſolutely diſcharged from all ſuch right, title, eſtate, intereſt, claim, and demand, as is veſted, or *that could or might accrue or belong to his Majeſty, his heirs, or ſucceſſors*, by reaſon or means of the ſaid Earl of Newburgh's having been born out of the dominions of the crown of Great Britain: but when it mentions the right, which accrued to the crown by virtue of the attainder, it is *abſolutely and unequivocally, freed and diſcharged* from all ſuch right, title, eſtate, intereſt, claim, and demand, *as was veſted* &c. The reaſon of this is obvious: it was an unqueſtionable point in law, that ſome right accrued to the crown, by virtue of the attainder, but it was not in the ſlighteſt degree certain, that any right accrued to the crown by the Earl of Newburgh's having being born in France. However 30,000l were direct-

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ed to be raiſed off the eſtates compriz-ed in the ſettlement of 1712, under the truſts of a term of 500 years created therein: 6000l. of which were to be paid to the younger children of the ſaid late Counteſs of Newburgh, and the remainder to the preſent Earl of Newburgh: all which was raiſed and paid accordingly. And a proviſo was inſerted in the ſaid act, that none of the children of the ſaid Counteſs of Newburgh, by Charles Radcliffe, born abroad, ſhould claim to be naturalized by virtue of *this* act: which proviſo will certainly not take from them the rights, which the former acts of parliament had actually veſted in them.

Although it be evident, that this act ſuppoſes Lord Newburgh, to be an alien, yet cannot ſuch ſuppoſition or preſumption of the legiſlature alter or avoid the effects of prior ſtatutes, which it does not undertake to reſtrain or repeal: and whatever is enacted upon the ground of ſuch falſe ſuppoſi-on or preſumption, is of itſelf null

and

and void. This will appear clear from the caſe put by my Lord Chancellor Hatton: * "A nobleman of this realm "lately deceaſed, was attainted *de* "*facto* of high treaſon, in Queen Ma- "ry's time, and in an act of parliament, "it was intended to confirm the judge- "ment; and thoſe words were void, "becauſe the attainder was void by "miſrecital: and by conſequence for "want of juriſdiction in the commiſ- "ſioners; and becauſe it was void, it "it could not be confirmed, for that, "which is weak, may be made ſtron- "ger, but that which hath no ſub- "ſiſtance, cannot be corroborated: "*et confirmare, eſt illud quod eſt, fir-* "*mum facere.* Likewiſe divers ſta- "tutes, that ſhould have been conti- "nued in parliament, have been miſ- "recited and by that occaſion diſcon- "tinued and diſſolved."

So in this caſe, the act ſuppoſes the right of the Earl of Newburgh, to have been extinguiſhed by his foreign

* Hatton in ſtatutes, ubi ſupra.

birth, and the parliament undertakes to confirm that extinguiſhment, by procuring the actual conſent of the Earl of Newburgh. But if his right was not extinguiſhed *ab initio*, or rather if his right ever had accrued, it is impoſſible, in the principles of the ſaid learned chancellor, for parliament to have cauſed ſuch an extinguiſhment, which it only meant to confirm. For if the parliament meant to create ſuch an extinguiſhment, or to take out of the Earl of Newburgh the right to be a natural born ſubject of England, which was actually veſted in him, then will neither common ſenſe or common juſtice warrant any other concluſion, than that he was moſt infamouſly deceived, and inſidiouſly treated in the bargain: nothing elſe can be ſaid of a tranſaction or a bargain, in which, one party intends to draw in the other, to part with an intereſt, which he knew not, that he had in him, and which was in no manner expreſſed in the terms of the bargain. Eſau when preſſed with faintneſs and hunger, parted

parted with his firſt birth-right, for a meſs of broth: but he did it, ſo far with his eyes open, as to know that he had his *firſt-birth right* in him: for he ſaith; *lo I die, what will the firſt birth-right avail me?* but the Earl of Newburgh, knew not that he had in him the birth right, and therefore could not be ſaid to have ſold it, even as Eſau did.

The preſent Lord Viſcount Kinnaird is the eldeſt and only ſon of the Earl, of Newburgh; he was born in England ſince the paſſing of the 22d of George the 2d: either this act ſuppoſes the Earl of Newburgh to be an alien or to be tenant in tail male of the premiſes: if he was an alien, then nothing, which he could do, could affect the premiſes which he could not hold or enjoy: and then the 24000l is no more than a compaſſionate relief to his diſtreſſed circumſtances. If he has any right to the eſtates in queſtion, it is to be tenant in tail thereof; which entail he might have barred the

firſt term after his title accrued: in this ſuppoſition, the Earl of Newburgh muſt be conſidered as parting with a preſent intereſt for about one tenth part of it's value: the reſpect due to the legiſlature forbids us on one hand to conclude, that they overreached and miſled a diſtreſſed man upon falſe pretences, in an open bargain; and on the other hand, the very dictates of nature will not permit us to adopt the oppoſite concluſion, that he voluntarily accepted of £. 24000 inſtead of £. 200000, for which the eſtates would have probably then ſold.

The Earl of Newburgh is not made an alien by this act, if he was not ſo by any former act. The doctrine laid down in the foregoing ſheets, it is hoped, is concluſive that he is no alien. If then he be no alien, it is clear, that he or his iſſue cannot be excluded and barred from the poſſeſſion of the eſtates comprized in the ſettlement of 1712, unleſs it be by reaſon of this act; and if it be by reaſon of this act, then muſt this act be an actual ſale of an eſtate

tate tail by the tenant in tail, in the firſt place, for an inadequate conſideration, and in the ſecond place, without thoſe legal requiſites, which are neceſſary to veſt the fee ſimple of ſuch an eſtate in a purchaſer; and the act does not undertake to diſpenſe with theſe neceſſary conditions of law. To conclude, if parliament will inſiſt upon the validity of the bargain and ſale, and enforce the ſame againſt the tenant in tail; yet aſſuredly, the quality of the purchaſers ſhall not alter the legal effects of the bargain, and without the moſt expreſs words, the legiſlature ſhall not be conſtrued to have taken from Lord Kinnaird the right to an eſtate tail, which muſt neceſſarily ariſe to him after the death of his father, unleſs the entail ſhall be barred by thoſe methods alone, to which the law of the land gives ſanction and effect. In the caſe of an indifferent purchaſer, ſuch ſale would only ſtand againſt the tenant in tail for his own life, but would not bar his iſſue: why then is Lord Kinnaird

to

to ſuffer, becauſe in this inſtance, the purchaſers are the governors and truſtees of a public and laudable foundation.

Better ten guilty men ſhould eſcape than one innocent ſuffer.

In every act of cruelty or injuſtice, it is obſervable, that ſome fatal inconſiſtency generally ariſes on behalf of the injured perſon, to ſhew more glaringly to the public, the nature of the injuſtice done him. Much has been ſaid in the foregoing ſheets of the inconſiſtency of the act of the 4th of George the 2d. It is highly becoming and neceſſary, that every member of the legiſlature, as well as of the community, ſhould cooly and impartially attend to the following inconſiſtencies contained in the 22d of George the 2d. The preſent Earl of Newburgh, is clearly ſuppoſed to be an alien at the time of it's paſſing, otherwiſe it would not have been enacted, that nothing therein contained, ſhould be conſtrued to naturalize him or his brother and ſiſters :

ſiſters: now if he were an alien, he could have no right in him: and therefore could not extinguiſh the right of himſelf or his heirs: for where there is no right, there can be no extinguiſhment of *right*, as is ſelf evident. Again, this act in one breath, as it were, denies that the Earl of Newburgh is a natural liege ſubject of his Majeſty, and moſt forcibly enacts him to be ſuch; it obliges him to enter into a recognizance, *by which he ſhall be bound to his Majeſty, his heirs and ſucceſſors, in the ſum of £. 50000 not to enter into the ſervice of any foreign prince, ſtate, or potentate, in any capacity whatſoever, nor to depart this realm without the licence of his Majeſty, his heirs or ſucceſſors, &c.* The firſt queſtion, which ariſes upon this recognizance is, whether any ſuch act of ſovereignty can be exerciſed by our King over any other than his own liege ſubjects? The next queſtion is, whether a Frenchman (for if the Earl of Newburgh be an alien as to this country, he is a Frenchman by birth) having

having entered into an engagement, not to ſerve a *foreign* prince, can be ſaid to have violated his engagement, by ſerving his own native ſovereign, the King of France? And the laſt queſtion is, whether the King of England, is not to all intents and purpoſes a *foreign prince*, as to every perſon who is an alien by our law?

The author of the foregoing ſheets conſides, that he will be ſeconded by every britiſh ſubject, in his wiſhes and attempt to bring the law to a certainty and the injured to their juſt rights.

FINIS.